(17,337.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 242.

C. W. SMITH, AS RECEIVER OF THE ATLANTIC AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

TRUMAN REEVES, AS TREASURER OF THE STATE OF CALIFORNIA.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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1 In the Circuit Court of the United States for the Northern District of California.

J. W. REINHART, JOHN J. McCOOK, and JOSEPH C. WILSON, as Receivers of the Atlantic & Pacific Railroad Company, Plaintiffs,

vs.

J. R. McDONALD, as Treasurer of the State of California, Defendant.

Complaint.

I.

The plaintiffs allege and show to the court that the Atlantic & Pacific Railroad Company is now and for a long time last past has been a corporation duly incorporated under an act of the Congress of the United States of America approved July 27th, 1866, and that it now has and for over five years last past has had in operation under said act of Congress a line of railroad from the city of Albuquerque, in the county of Bernalillo, in the Territory of New Mexico, to Mojave, in the county of Kern and State of California.

II.

That in January, 1894, in actions then pending in each of said hereinafter-named courts, wherein The Mercantitle Trust Company of New York was and is plaintiff and The Atlantic & Pacific Railroad Company was and is defendant, these plaintiffs were
2 duly appointed by the district court of the second judicial district of the Territory of New Mexico receivers of the said Atlantic & Pacific Railroad Company and of its property and effects within the Territory of New Mexico, and that immediately thereafter and in the same month they were duly appointed by the district court of the fourth judicial district, in the Territory of Arizona, receivers of said railroad company and its property in the Territory of Arizona, and that thereafterwards and during the same month they were duly appointed receivers of the said railroad company and its property located in the southern district of the State of California by the circuit court of the United States in and for said district, and that thereafterwards and during said month they were duly appointed by the United States circuit court for the northern district of the State of California receivers of the property of said railroad company in said district.

III.

That thereafterwards the plaintiffs duly qualified as such receivers and entered upon the discharge of their duties as such receivers under and by virtue of said various appointments, and that they are now and for more than two months last past have been

the duly appointed, qualified, and acting receivers of said railroad company, having received from it all of its rights, property, and choses in action.

IV.

That up to and prior to August, 1884, the Atlantic & Pacific Railroad Company had constructed and had under operation under its charter a line of railroad from Isleta, Bernalillo county, New Mexico, through the territory of Arizona to the Colorado river, on the eastern boundary of the State of California, between the 34th and 35th parallel of latitude, at a point on the eastern boundary of said river near the town of Needles, California.

That at the date referred to last aforesaid the Southern Pacific Railroad Company, a corporation duly incorporated at that time under the laws of the State of California under and pursuant to the 18th section of the act of Congress above referred to and approved July 27th, 1866, and the joint resolution of the Congress of the United States approved June 28th, 1870, had built, constructed, and had in operation from the town of Mojave, in the county of Kern, in the State of California, a line of railroad eastward to the eastward line of the Colorado river, at a point where it would form a junction with the line of the Atlantic & Pacific railroad, as aforesaid; that on the 20th day of August, A. D. 1884, the said Southern Pacific Railroad Company, the Atlantic & Pacific Railroad Company, the St. Louis & San Francisco Railway Company, a corporation duly incorporated and organized under the laws of the State of Missouri, and the Atchison, Topeka & Santa Fe Railroad Company, a corporation incorporated, organized, and existing under the laws of the State of Kansas, made and entered into an agreement, whereby and by the terms of which the Southern Pacific Railroad Company was party of the first part, and the Alantic & Pacific Railroad Company was party of the second part, and the other two companies parties of the third and fourth parts; that the first and second clauses contained in said contract were and are as follows:

"First. The party of the first part has agreed to sell to the party of the second part, and the party of the second part has agreed to purchase from the party of the first part the said line of railway of the party of the first part from the west end of the bridge over the Colorado river at or near the Needles, in the State of California two hundred and forty-two and thirty-seven one-hundredths miles or thereabouts, to the easterly margin of the grounds or yards of the party of the first part, used in connection with the Mojave Junction station, or with the main line of road of said party of the first part between Goshen and Yuma, together with the right of way of said railroad company therefor, two hundred feet in width, and the switches, sidings and turnouts, and the station buildings, section-houses, turn-tables and other appurtenances to said line of railway (except that this is not to be construed to include equipment or to interfere with the right of way and depot grounds of the party of

the first part at the said Mojave junction, but the party of the second part is to have the right to make a physical connection between its tracks and the tracks of the party of the first part at that point), at and for the price of thirty thousand dollars a mile of said railway, that is to say, seven million two hundred and seventy-one thousand one hundred dollars ($7,271,100), of which purchase price one-sixth part thereof, that is to say, one million two hundred eleven thousand, eight hundred and fifty dollars ($1,211,850), is to be paid by the party of the second part to said party of the first part in cash, and the remainder thereof, viz: six million and fifty-nine thousand two hundred and fifty dollars ($6,059,250), is to be paid by said party of the second part to said party of the first part, either in cash, or in first-mortgage six per cent. bonds of the party of the second part, issued under and secured by its first mortgage bearing date first day of July, 1880, and the prompt payment of the principal and interest of which shall have been legally guaranteed by the parties of the third and fourth parts respectively; it being understood and agreed that such sale is to be consum-ated and the purchase price of such line of railway paid whenever the party of the first part is able to make clear title to said line of railway, discharged from the lien of its first mortgage bearing date the first day of April, 1875, hereinbefore referred to, and from all other liens existing thereon at the day of the date of these presents, or which may be imposed thereon by the party of the first part at any time from the day of the date of these presents to the consummation of such sale.

"Second. In the meantime, and until the consummation of such sale and payment of the purchase price as aforesaid, the party of the first part has leased and demised to said party of the second part, and said party of the second part has hired from said party of the first part, from the first day of October, 1884, the said line of railway from the west end of the bridge over the Colorado river to such easterly margin of such grounds or yards of the party of the first part as above described, together with the other appurtenances thereto hereinbefore agreed to be sold (but excluding equipment), at and for the annual rental of eighteen hundred dollars per mile of such railway, to wit: four hundred and thirty-six thousand two hundred and sixty-six dollars ($436,266), payable semi-annually during the continuance of such lease, and the said party of the second part has covenanted and agreed and hereby covenants and agrees to and with said party of the first part, that the said party of the second part will, and its successors and assigns shall, pay to the said party of the first part, its successors and assigns, as rental for such line of railway and appurtenances, until the time of the consummation of such sale and the payment of the purchase price thereof as aforesaid, the sum of two hundred and eighteen thousand one hundred and thirty-three dollars ($218,133), on the first day of April and October in each and every year, and that it, the said party of the second part will, and its successors and assigns shall, further promptly pay and discharge all taxes and assessments which shall hereafter become due upon said

property or any part thereof, or may become in any wise due or owing in respect to the same, and will maintain, repair and replace such property so that the same may, at all times, be and remain in substantially as good plight and condition as that in which it now is, the nature and character of the property being considered."

That under and by virtue of said contract and the clauses hereinabove set forth, therein contained, the Atlantic & Pacific Railroad Company, on the first day of October, 1884, entered into the
7 actual, sole, and exclusive possession of all that line of railroad from the town of Mojave, in the county of Kern, to the Colorado river, in the county of San Bernardino, in said State of California; that the said railroad so acquired from the Southern Pacific Railroad Company by the Atlantic & Pacific Railroad Company under the provisions of said contract was and ever since has been 242.50 miles in length.

That at the time of making and entering into said contract hereinabove referred to and ever since said time the Southern Pacific Railroad Company, as the plaintiffs are informed and believed, owned and operated in the State of California under its name about 1,000 miles of railroad in said State, including the line covered by said contract, as aforesaid; that during the years 1888, 1889, 1890, 1891, 1892, and 1893 the Southern Pacific Railroad Company has returned to the State board of equalization of the State of California a statement of the property owned by said company in said State for the purpose of having the State board of equalization assess the same for taxation for said years; that said return has always included in the mileage given the railroad so sold and leased to the Atlantic & Pacific Railroad Company under the terms of said contract of August 20, 1884, as aforesaid, and that during each of those years the State board of equalization has apportioned the entire value of all the personal property of the said Southern Pacific Railroad Company, consisting of cars, locomotive engines, and other property of that character, along the entire mileage of said road, returned by it to said State board as aforesaid, and has divided the total value of the road-bed, the rails, rolling stock, and all
8 things which the State board of equalization had a right to assess, by the total mileage of said road, including the line from Mojave to the Colorado river, as aforesaid, and made an assessment at so much per mile of said road, based on the result of such division, which has not been less, as plaintiffs are informed and believe, than ten thousand dollars ($10,000) a mile for each of those years, except as hereinafter stated; that for the year 1893 the State board assessed the Southern Pacific Railroad Company at the rate of $9,303.95 per mile on the total mileage of said railroad company in the State of California, and that that assessment included the value of all rolling stock, cars, engines, and personal property of every description owned by the Southern Pacific Railroad Company which could be assessed in connection with the operation of its road in said State, it running into and through several counties therein, and that said assessment included the 242.51 miles of road from Mojave to the Colorado river covered by the contract of August

20th, 1884, as aforesaid; that notwithstanding said fact the State board of equalization of the State of California did, in the year 1893, demand and require of the Atlantic & Pacific Railroad Company that it should make a return to it of all its personal property in the shape of rolling stock, &c., used in the operation of the line of road from the Colorado river to Majave, acquired by the Southern Pacific under said contract, and that thereupon, and under protest, the Atlantic & Pacific Railroad Company returned to the said State board that it had in operation eighty-nine cars and locomotive engines of the value of
9 $56,810, which it had in use and operation at times along the line of said road so acquired by said contract, as aforesaid; that thereupon the said State board of equalization assessed said rolling stock at a total valuation of $125,000, or $515.44 a mile, notwithstanding the fact that the same board had assessed the line of railroad on which said rolling stock was used to the Southern Pacific Railroad Company, together with its *pro rata* share of said railroad's personal property, including rolling stock, at the rate of $9,303.95; that the State board of equalization first assessed said line of road to the Southern Pacific Railroad Company, as aforesaid, and included in said assessment the average value of the entire rolling stock of the Southern Pacific per mile, so that the total assessment of said line was $9,303.95 per mile, including its *pro rata* share of rolling stock aforesaid, and then said board assessed the Atlantic & Pacific Railroad Company upon the same mileage the sum of $515.44 per mile for rolling stock only.

That the State board thereupon levied upon said assessment against the Atlantic & Pacific Railroad Company a total tax of $2,272.80, and that it also levied against the Southern Pacific Railroad Company for the same line of railroad a total tax of $33,981.58; that during the year 1893 the cars and locomotive engines assessed by the Atlantic & Pacific Railroad Company upon said line of railroad were through cars running over said line of railroad from the east and from the west, the passenger cars originating in Chicago, in the State of Illinois, and in Albuquerque, in the Territory
10 of New Mexico, and in San Diego, Los Angeles, and San Francisco, in the State of California; that during all of said time the Atlantic & Pacific Railroad Company, through contract, formed a part of a through transcontinental system between Chicago, Illinois, in the East, and Los Angeles, San Diego, and San Francisco, in the State of California, and that the cars operated over said line of railroad in California were to a very large extent through cars, running on through trains, and none of said cars were locally kept all the time upon said line of railroad, and none were kept stationery in the State of California or in said State at all, except when in operation and running over that portion of the track of the Atlantic & Pacific Railroad Company located therein; that during the year 1893 the Atlantic & Pacific Railroad Company returned all of its rolling stock owned by it and subject to taxation for assessment and taxation to the proper authorities in the county of Bernalillo and Territory of New Mexico, that being the headquarters of said rail

road company, where its eastern terminus was and is, and the situs of all of its property outside of its track, right of way, and stations; that on the 27th day of March, 1894, these plaintiffs, for the Atlantic & Pacific Railroad Company and as receivers of it, paid the second half of installment of the taxes for the year 1893, so levied by the said State board of equalization, as aforesaid, to the treasurer of the State of California, and prior to the commencement of this action all of said taxes so levied, as aforesaid, amounting to the aforesaid sum of $2,272.80, were duly paid to said State treasurer; that prior to
11 the commencement of this action and prior to the first day of June, 1894, these plaintiffs, as such receivers, gave notice, in writing, to the controller of the State of California that they intended to bring an action against the treasurer of the State of California to recover the taxes so levied and assessed, as aforesaid, and paid by the Atlantic & Pacific Railroad Company to said State treasurer; which said notice in all respects *in all respects* conformed with the requirements of the statute. A true and correct copy of the same is hereto attached, marked Exhibit "A," and made a part hereof; that the making of said assessment and the levy of said taxes on the rolling stock of the Atlantic & Pacific Railroad Company by said State board of equalization for the year 1893 was unauthorized by law, illegal, and void, by reason of the facts aforesaid; that the Southern Pacific has paid the taxes levied on said line, as aforesaid.

Wherefore these plaintiffs demand judgment against said defendant, as the treasurer of the State of California, for the sum of $2,272.80, with interest thereon from the date of the payment of said sum or any portion thereof to the State treasurer, together with the costs of this action.

C. N. STERRY,
Attorney for Plaintiffs.

E. S. PILLSBURY, *Of Counsel.*

12 EXHIBIT "A."

ALBUQUERQUE, N. M., *March* 28, 1894.

To the comptroller of the State of California, Sacramento, California:

You will please take notice that J. W. Reinhart, John J. McCook, and Joseph C. Wilson, the receivers who have been duly appointed as receivers of the Atlantic & Pacific Railroad Company, of all its rights and property, and who since such appointment have duly qualified and entered upon the discharge of the duties of their office and taken possession of said railroad, of all its property and rights in action, intend to bring an action against the State treasurer of the State of California to recover from said State treasurer the sum of twenty-two hundred and seventy-two dollars and $\frac{80}{100}$ ($2,272.80), the amount of tax- paid by the Atlantic & Pacific Railroad Company and by the receiver for it to the State treasurer as and for taxes assessed against the Atlantic & Pacific Railroad Company in the

State of California for the year 1893 by the State board of equalization of said State.

Respectfully,

J. W. REINHART,
JOHN J. McCOOK, AND
JOSEPH C. WILSON,
By C. N. STERRY,
Their Attorney.

13 I hereby acknowledge that the original of the above and foregoing notice was delivered to me, at Sacramento, California, on the 2nd day of April, 1894, and filed on said date.

E. P. COLGAN,
State Comptroller.

(Endorsed:) Filed May 23, 1894. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

14 *Summons.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, Northern District of California.

J. W. REINHART, JOHN J. McCOOK, and JOSEPH C. WILSON, as Receivers of the Atlantic & Pacific Railroad Company, Plaintiffs,

v.

J. R. McDONALD, as Treasurer of the State of California, Defendant.

Action brought in the said circuit court and the complaint filed in the office of the clerk of said circuit court in the city and county of San Francisco.

The President of the United States of America to J. R. McDonald, as treasurer of the State of California, defendant, Greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the circuit court of the United States, ninth circuit, in and for the northern district of California, and to file your plea, answer, or demurrer to the complaint filed therein (a certified copy of which accompanies this summons) in the office of the clerk of said court, in the city and county of
15 San Francisco, within thirty days after the service on you of this summons, or judgment by default will be taken against you.

The said action is brought to recover from you, said defendant, the sum of $2,272.80, alleged to be due from you to plaintiffs, and which said sum was received by you from plaintiffs in payment of certain taxes assessed and levied for the year 1893, the making of the assessment under which said taxes were levied & the levy of said taxes being claimed by plaintiffs to be unauthorized by law,

illegal, and void. Plaintiffs also demand interest and costs of suit; all of which is more fully set out in the original complaint on file herein, to which reference is hereby made; and if you fail to appear and plead, answer or demur, as herein required, your default will be entered and the plaintiff will apply to the court for the relief demanded in the complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 23d day of May, in the year of our Lord one thousand eight hundred and ninety-four, and of our Independence the 118th.

[SEAL.]

W. J. COSTIGAN, *Clerk*,
By W. B. BEAIZLEY,
Deputy Clerk.

(Endorsed:)

UNITED STATES MARSHAL'S OFFICE,
Northern District of California.

16 I hereby certify that I received the within writ on the 29th day of May, 1894, and personally served the same on the 31st day of May, 1894, on J. R. McDonald, treasurer of the State of California, by delivering to and leaving with J. R. McDonald, treasurer of the State of California, said defendant named therein, at the county of Sacramento, in said district, an attested copy thereof, together with a certified copy of the complaint, certified to by the clerk of the court, attached thereto.

W. G. LONG, *U. S. Marshal*,
By S. P. MONCKTON, *Deputy.*

San Francisco, June 1st, 1894.

(Endorsed:) Filed June 1st, 1894. W. J. Costigan, clerk, by W. B Beaizley, deputy clerk.

17 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

J. W. REINHART, JOHN J. McCOOK, and JOSEPH C. WILSON, as Receivers of the Atlantic & Pacific Railroad Company, Plaintiffs,

vs.

J. R. McDONALD, as Treasurer of the State of California, Defendant.

Demurrer to Complaint.

The demurrer of J. R. McDonald, as treasurer of the State of California, to the bill of complaint of J. W. Reinhart, John J. McCook, and Joseph C. Wilson, as receivers of the Atlantic and Pacific Railroad Company.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are herein set forth and alleged, doth demur to the said bill, and for causes of demurrer showeth:

I. That it appeareth by the plaintiffs' own showing by the said bill that they are not entitled to the relief prayed by the bill against this defendant.

II. That it appeareth by plaintiffs' own showing by the
18 said bill of complaint that they are not entitled to the relief prayed for by the bill of complaint against this defendant, in that said bill shows that said Atlantic and Pacific Railroad Company was properly assessed upon the rolling stock mentioned in said bill of complaint, and it does not appear by the said bill that said plaintiffs have paid other than as set forth in said complaint or are willing to pay whatever may be justly payable to the State of California for taxes for the year mentioned in said bill of complaint.

III. That it appeareth by the plaintiffs' own showing by the said bill that said bill does not state facts sufficient to constitute a cause of action against this defendant, either in his individual or in his official capacity.

IV. That it appears by the said bill that there is another person or corporation who or which is a necessary party to the said bill, but are not made parties thereto.

V. It appears by the said bill that the said Southern Pacific Railroad Company is a party to the contract referred to and set forth in part in said bill of complaint, and that said company is interested in the matter in dispute in this action to the extent that it is charged that any assessment, if wrongfully made, was caused so to be made by the said Southern Pacific Railroad Company, and not by the State board of equalization of the State of California; and it further appears that the said Southern Pacific Railroad Company is not made a party hereto.

And it further particularly appears that said Southern Pacific Railroad Company has paid all the taxes levied against it on
19 its property, as alleged in said complaint, including the line of road operated by said plaintiffs, and that the rolling stock of said Atlantic and Pacific Railroad Company upon said 242.51 miles of road, mentioned in said bill of complaint as lying wholly in said State of California and operated by said plaintiffs, which said rolling stock, as shown by said bill of complaint, is permanently operated upon said 242.51 miles of road, is assessed to said Atlantic and Pacific Railroad Company and was so properly assessed to said company, and therefore said plaintiffs are not entitled to any relief on account of the assessment of said rolling stock.

Wherefore, and for divers other good causes of demurrer appearing on the said bill, this defendant doth demur thereto, and he prays the judgment of this honorable court whether he shall be compelled to make any answer to the said bill, and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

WM. H. H. HART,

Attorney General, Solicitor for the Defendant, J. R. McDonald, as Treasurer of the State of California, 305 Larkin Street, San Francisco, Cal.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

WM. H. H. HART,
Of Counsel for Defendant, J. R. McDonald, as Treasurer of the State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, Northern District of California, } ss:

W. H. H. Hart, being duly sworn, deposes and says that he is the attorney general of the State of California and officially represents the defendant in the above-entitled action as solicitor and as of counsel; that said defendant is absent from the city and county of San Francisco and resides in Sacramento, California, and that it is inconvenient for him to make this affidavit.

This affiant further deposes and says that the foregoing demurrer is not interposed for delay.

WM. H. H. HART.

Sworn to before me this 3d day of October, 1894.

ALBERT BETZ,
Phonographic Reporter for the Attorney General.

(Endorsed:) Service of a copy of the within demurrer admitted this 3d day of October, 1894. E. S. Pillsbury, attorney for plaintiffs. Filed Oct. 3, 1894. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

In the Circuit Court of the United States for the Northern District of California.

J. W. REINHART ET AL., as Receivers, etc., Plaintiffs,
vs.
J. R. McDONALD, as Treasurer of the State of California, Defendant. } No. 11915.

Motion to Dismiss Cause.

To the above-named plaintiffs and to their attorney and counsel, C. N. Sterry, Esq., and E. S. Pillsbury, Esq.:

Please take notice that on Monday, the 27th day of May, 1895, at the hour of eleven o'clock a. m., or as soon thereafter as counsel can be heard, the above-named defendant, by his counsel, will move this honorable court, at the court-room thereof, in the United States Appraisers' building, city and county of San Francisco, State of California, to dismiss the above-entitled action on the following grounds, to wit:

1. That the court has no jurisdiction of the person of this defendant.
2. That the court has no jurisdiction of the action.

Said motion will be made upon the papers and pleadings on file in this action.

22 W. F. FITZGERALD,
Attorney General, Counsel for Defendant.

(Endorsed:) Service of copy of the within notice admitted this 14th day of May, 1895. C. N. Sterry, E. S. Pillsbury, att'ys for plaintiffs. Filed May 14th, 1895. W. J. Costigan, clerk.

At a stated term, to wit, the July term, A. D. 1896, of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, held at the court-room, in the city and county of San Francisco, on Monday, the 17th day of August, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable Joseph McKenna, circuit judge.

J. W. REINHART, &c., ET AL.
vs.
J. R. McDONALD, Treasurer, &c. } No. 11915.

Order Sustaining Demurrer and Denying Motion to Dismiss.

23 The demurrer of defendant to plaintiffs' complaint and the motion of defendant to dismiss, heretofore submitted herein, having been fully considered, and the opinion of the court having been filed, it is, in accordance with said opinion, ordered that said demurrer be, and hereby is, sustained, with leave to plaintiffs to amend their complaint within 20 days if so advised; and it is further ordered that said motion to dismiss be, and the same hereby is, denied.

24 In the Circuit Court of the United States for the Northern District of California.

C. W. SMITH, Successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson, as Receivers of the Atlantic and Pacific Railroad Company, and Receiver of the Atlantic and Pacific Railroad Company, Plaintiff,
vs.
LEVI RACKLIFFE, as Successor in Office to J. R. McDonald, as Treasurer of the State of California, Defendant.

Amended Complaint.

I.

The plaintiff alleges and shows to the court that the Atlantic and Pacific Railroad Company is now, and for a long time last past has been, a corporation duly incorporated under an act of the Congress of the United States of America, approved July 27th, 1866, and that it now has, and for over five years last past has had in operation

under said act of Congress a line of railroad from the city of
25 Albuquerque, in the county of Bernalillo, in the Territory of New Mexico, to Mojave, in the county of Kern and State of California.

II.

That in January, 1894, in actions then pending in each of said hereinafter-named courts, wherein The Mercantile Trust Company of New York was and is plaintiff, and The Atlantic and Pacific Railroad Company was and is defendant, the former plaintiffs were duly appointed by the district court of the second judicial district of the Territory of New Mexico receivers of the said Atlantic and Pacific Railroad Company, and of its property and effects, within the Territory of New Mexico, and that immediately thereafter, and in the same month, they were duly appointed by the district court of the fourth judicial district in the Territory of Arizona receivers of said railroad company and its property in the Territory of Arizona; and that thereafter, and during the same month, they were duly appointed receivers of the said railroad company and its property located in the southern district of the State of California, by the circuit court of the United States in and for said district; and that thereafter, and during said month, they were duly appointed by the United States circuit court of the northern district of the State of California receivers of the property of said railroad company in said district.

III.

That thereafter the former plaintiffs duly qualified as such
26 receivers, and entered upon the discharge of their duties as such receivers under and by virtue of said various appointments, and that the former plaintiffs continued as such receivers until the fall of 1894, when J. W. Reinhart resigned in each of said courts as such receiver, and that thereupon A. F. Walker was, in each of said courts, duly appointed receiver in the place of the said J. W. Reinhart, and that he thereupon entered upon the discharge of his duties as such receiver; that in the fall of 1895 Joseph C. Wilson, one of said receivers, died, and that the vacancy occasioned by his death was not afterwards filled except as hereinafter stated; that on and prior to the 1st day of February, 1896, A. F. Walker and John J. McCook, the surviving receivers, resigned in each of said courts wherein they were appointed, and their resignations were duly accepted, and that thereupon in each of said courts, in said causes of action aforesaid, C. W. Smith was appointed receiver of the Atlantic and Pacific Railroad Company and its property, and that thereupon he duly qualified in each of said jurisdictions as such receiver, and that he is now, and since the 1st day of February, 1896, has been, the sole and only receiver of the Atlantic and Pacific Railroad Company in each of the jurisdictions aforesaid, and since said date has had full and exclusive possession of the property of said Atlantic and Pacific Railroad Company, and is the successor in interest of the original receivers appointed as aforesaid.

IV.

That up to and prior to August, 1894, the Atlantic and Pa-
27 cific Railroad Company had constructed and had under operation under its charter a line of railroad from Isleta, Bernalillo county, New Mexico, through the Territory of Arizona, to the Colorado river, on the eastern boundary of the State of California, between the 34th and 35th parallel of latitude, at a point on the eastern boundary of said river near the town of Needles, California, a distance of some 577 miles.

That at the date referred to last aforesaid the Southern Pacific Railroad Company, a corporation duly incorporated at that time under the laws of the State of California, under and pursuant to the 18th section of the act of Congress above referred to, and approved July 27th, 1866, and the joint resolution of the Congress of the United States approved June 28th, 1870, had built, constructed, and had in operation from the town of Mojave, in the county of Kern, in the State of California, a line of railroad eastward to the westward line of the Colorado river, at a point where it would form a junction with the line of the Atlantic and Pacific railroad as aforesaid. That on the 20th day of August, A. D. 1884, the said Southern Pacific Railroad Company, the Atlantic and Pacific Railroad Company, the St. Louis and San Francisco Railway Company, a corporation duly incorporated and organized under the laws of the State of Missouri, and the Atchison, Topeka and Santa Fe Railroad Company, a corporation incorporated, organized, and existing under the laws of the State of Kansas, made and entered into an agreement, whereby and by the terms of which the Southern Pacific Railroad Company was party of the first part, and the At-
28 lantic and Pacific Railroad Company was party of the second part, and the other two companies parties of the third and fourth parts; that the first and second clauses contained in said contract were and are as follows:

"First. The party of the first part has agreed to sell to the party of the second part, and the party of the second part has agreed to purchase from the party of the first part, the said line of railway of the party of the first part from the west end of the bridge over the Colorado river at or near the Needles, in the State of California, two hundred and forty two and thirty-seven one-hundredths miles, or thereabouts, to the easterly margin of the grounds or yards of the party of the first part, used in connection with the Mojave Junction station, or with the main line of road of said party of the first part between Goshen and Yuma, together with the right of way of said railroad company therefor, two hundred feet in width, and the switches, sidings, and turnouts, and the station buildings, section-houses, turn-tables, and other appurtenances to said line of railway (except that this is not to be construed to include equipment, or to interfere with the right of way and depot grounds of the party of the first part at the said Mojave junction, but the party of the second part is to have the right to make a physical connection between its tracks and the tracks of the party of the first part at that point),

at and for the price of thirty thousand dollars a mile of said railway; that is to say, seven million two hundred and seventy-one thousand one hundred dollars ($7,271,100), of which purchase price one-sixth part thereof, that is to say, one million two hundred
29 eleven thousand eight hundred and fifty dollars ($1,211,850), is to be paid by the party of the second part to said party of the first part in cash, and the remainder thereof, viz., six million and fifty-nine thousand two hundred and fifty dollars ($6,059,250), is to be paid by said party of the second part to said party of the first part, either in cash or in first-mortgage six per cent. bonds of the party of the second part, issued under and secured by its first mortgage bearing date first day of July, 1880, and the prompt payment of the principal and interest of which shall have been legally guaranteed by the parties of the third and fourth parts respectively; it being understood and agreed that such sale is to be consummated and the purchase price of such line of railway paid whenever the party of the first part is able to make clear title to said line of railway, discharged from the lien of its first mortgage, bearing date the first day of April, 1875, hereinbefore referred to, and from all other liens existing thereon at the day of the date of these presents, or which may be imposed thereon by the party of the first part at any time from the day of the date of these presents to the consummation of such sale.

"Second. In the meantime, and until the consummation of such sale and payment of the purchase price as aforesaid, the party of the first part has leased and demised to said party of the second part, and said party of the second part has hired from said party of the first part, from the first day of October, 1884, the said line of railway from the west end of the bridge over the Colorado river to such easterly margin of such grounds or yards of the party
30 of the first part as above described, together with the other appurtenances thereto hereinbefore agreed to be sold (but excluding equipment), at and for the annual rental of eighteen hundred dollars per mile of such railway, to wit, four hundred and thirty-six thousand two hundred and sixty-six dollars ($436,266), payable semi-annually during the continuance of such lease, and the said party of the second part has covenanted and agreed, and hereby covenants and agrees to and with said party of the first part, that the said party of the second part will, and its successors and assigns shall, pay to the said party of the first part, its successors and assigns, as rental for such line of railway and appurtenances, until the time of the consummation of such sale and the payment of the purchase price thereof as aforesaid, the sum of two hundred and eighteen thousand one hundred and thirty-three dollars ($218,133), on the first day of April and October in each and every year, and that it, the said party of the second part, will, and its successors and assigns shall, further promptly pay and discharge all taxes and assessments which shall hereafter become due upon said property, or any part thereof, or may become in anywise due or owing in respect to the same, and will maintain, repair, and replace such property so that the same may at all times be and remain in

substantially as good plight and condition as that in which it now is, the nature and character of the property being considered."

That under and by virtue of said contract, and the clauses hereinabove set forth, therein contained, the Atlantic and Pacific
31 Railroad Company, on the first day of October, 1884, entered into the actual, sole, and exclusive possession of all that line of railroad from the town of Mojave, in the county of Kern, to the Colorado river, in the county of San Bernardino, in said State of California; that the said railroad so acquired from the Southern Pacific Railroad Company by the Atlantic and Pacific Railroad Company, under the provisions of said contract, was, and ever since has been, 242.50 miles in length; that no part of the contract of sale hereinabove referred to has been consummated other than the provisions concerning the lease of said railroad, and that no part of the purchase price has been paid to the Southern Pacific Railroad Company for and on account of said contract, and that the legal title to said railroad remains in the Southern Pacific Railroad Company.

That at the time of making and entering into said contract hereinabove referred to, and ever since said time, the Southern Pacific Railroad Company, as the plaintiff is informed and believes, owned and operated in the State of California, under its name, about 1,000 miles of railroad in said State, including the line covered by said contract as aforesaid, which said lines of railroad ran into and through more than one county in said State of California; that during the years 1888, 1889, 1890, 1891, 1892, and 1893, the Southern Pacific Railroad Company returned to the State board of equalization of the State of California a statement of the property owned by said company in said State, including its franchise, roadway, road-bed, rails, and rolling stock, for the purpose of having the State board of equalization assess the same for
32 taxation for said years; that said returns for each of said years included in the mileage given the railroad so leased to the Atlantic and Pacific Railroad Company under the terms of said contract of August 20, 1884, as aforesaid; that in the year 1893, and in due time, the State board of equalization of the State of California assessed the franchise, roadway, road-bed, rails, and rolling stock of the Southern Pacific Railroad Company in the State of California, including the line of railroad from Mojave to the Needles so leased to the Atlantic and Pacific Railroad Company as aforesaid, and that that assessment included the value of all rolling stock, cars, engines, and personal property of every description owned by the Southern Pacific Railroad Company which could be assessed in connection with the operation of its road in said State by the State board of equalization; and that said assessment included the 242.51 miles of road from Mojave to the Colorado river, covered by the contract of August 20th, 1884, as aforesaid. That notwithstanding said fact, the State board of equalization of the State of California did, in the year 1893, demand and require of the Atlantic and Pacific Railroad Company that it should make a return to it of all its personal property in the shape of rolling stock, etc., used in the operation of the line of road from the Colorado

river to Mojave, leased from the Southern Pacific under said contract, and that thereupon, and under protest, the Atlantic and Pacific Railroad Company returned to the said State board that it had in operation eighty-nine cars and locomotive engines of the value of $56,810, which it had in use and operation at times along
33 the line of said road so leased by said contract as aforesaid; that thereupon the said State board of equalization assessed said rolling stock at a total valuation of $125,000, or $515.44 a mile, notwithstanding the fact that the same board had assessed the line of railroad on which said rolling stock was used, to the Southern Pacific Railroad Company, together with its *pro rata* share of said railroad's personal property, including rolling stock, at the rate of $9,303.95 per mile. That the State board of equalization first assessed said line of road to the Southern Pacific Railroad Company as aforesaid, and included in said assessment the average value of the entire rolling stock of the Southern Pacific per mile, so that the total assessment of said line was $9,303.95 per mile for the year 1895, including its *pro rata* share of rolling stock aforesaid; and then said board assessed the Atlantic and Pacific Railroad Company upon the same mileage, the sum of $515.44 per mile for rolling stock only, and did not assess to it any mileage of any railroad whatever.

That the State board thereupon levied upon said assessment against the Atlantic and Pacific Railroad Company a total tax of $2,272.80, and that it also levied against the Southern Pacific Railroad Company for the same line of railroad a total tax of $33,981.58, which was duly paid to the State of California; that during the year 1893 the cars and locomotive engines assessed to the Atlantic and Pacific Railroad Company upon said line of railroad, and so returned by it to the State board of equalization, were through cars running over said line of railroad from the east and from the west, in and
34 out of the State of California; the trains containing the cars originating in Chicago, in the State of Illinois, and in Albuquerque, in the Territory of New Mexico, and in San Diego, Los Angeles, and San Francisco, in the State of California. That during all of said time the Atlantic and Pacific Railroad Company, through contract, formed a part of a through transcontinental system between Chicago, Illinois, in the east, and Los Angeles, San Diego, and San Francisco, in the State of California; and that the cars operated over said line of railroad in California were through cars, running on through trains, and none of said cars were locally kept all the time upon said line of railroad in the State of California, and none were kept stationary in the State of California, or in said State at all, except when in operation and running over that portion of the track of the Atlantic and Pacific Railroad Company located therein, and except when at stations for the purpose of loading and unloading. That during the year 1893 the Atlantic and Pacific Railroad Company returned all of its rolling stock owned by it and subject to taxation, including that as assessed as aforesaid, for assessment and taxation, to the proper authorities in the county of Bernalillo and Territory of New Mexico, that being the headquar-

ters of said railroad company, where its eastern terminus was and is, and the situs of all of its property outside of its track, right of way, and stations. That on the 27th day of March, 1894, the then plaintiffs, for the Atlantic and Pacific Railroad Company, and as receivers of it, paid the second half of installment of the taxes for the year 1893, so levied by the said State board of equaliza-
35 tion as aforesaid, to the treasurer of the State of California; and prior to the commencement of this action all of said taxes so levied as aforesaid, amounting to the aforesaid sum of $2,272.80, were duly paid to said State treasurer. That prior to the commencement of this action, and prior to the first day of June, 1894, the then plaintiffs, as such receivers, gave notice in writing to the comptroller of the State of California that they intended to bring an action against the treasurer of the State of California to recover the taxes so levied and assessed as aforesaid, and paid by the Atlantic and Pacific Railroad Company to said State treasurer, which said notice in all respects conformed with the requirements of the statute; a true and correct copy of the same is hereto attached, marked Exhibit "A," and made a part hereof; that the making of said assessment, and the levy of said taxes on the rolling stock of the Atlantic and Pacific Railroad Company, by said State board of equalization for the year 1893 was unauthorized by law, illegal, and void; that by assessing the railroad so leased by the Atlantic and Pacific Railroad Company to the Southern Pacific Railroad Company, its owner, the State board of equalization had no jurisdiction whatever to assess rolling stock belonging to the Atlantic and Pacific Railroad Company, and used, temporarily only, in the State of California, in the operation by the Atlantic and Pacific Railroad Company of through trains over and upon said leased line; that all of the rolling stock owned by the Atlantic and Pacific Railroad Company in the year 1893, or in its possession and under its control, was rolling stock used in transporting
36 freight and passengers on trains running from points in the State of California to points in other States and Territories east of it, and from points in other States and Territories east of the State of California to points in it; and that during said time no train was operated by the Atlantic and Pacific Railroad Company wholly within the State of California; that the home and situs of all of said rolling stock owned or controlled by the Atlantic & Pacific Railroad Company was at Albuquerque, in the Territory of New Mexico, during the year 1893.

That at the time of the commencement of this action J. McDonald was the duly elected, qualified, and acting treasurer of the State of California, but that since the commencement of this action and during its pendency the term of office of the said J. R. McDonald has expired, and that Levi Rackliffe is now the duly elected, qualified, and acting treasurer of the State of California, and successor in office to the said J. R. McDonald.

Wherefore, plaintiff demands judgment against said defendant, as the treasurer of the State of California, for the sum of $2,272.80, with interest thereon from the date of the payment of said sum, or

any portion thereof, to the State treasurer, together with the costs of this action.

C. N. STERRY,
Attorney for Plaintiff.

E. S. PILLSBURY, *Of Counsel.*

37 EXHIBIT "A."

ALBUQUERQUE, N. M., *March* 28, 1894.

To the comptroller of the State of California, Sacramento, California:

You will please take notice that J. W. Reinhart, John J. McCook, and Joseph C. Wilson, the receivers who have been duly appointed as receivers of the Atlantic and Pacific Railroad Company of all its rights and property, and who since such appointment have duly qualified and entered upon the discharge of the duties of their office, and taken possession of said railroad, of all its property and rights in action, intend to bring an action against the State treasurer of the State of California to recover from said State treasurer the sum of twenty-two hundred and seventy-two dollars and $\frac{80}{100}$ ($2,272.80), the amount of tax paid by the Atlantic and Pacific Railroad Company, and by the receivers for it, to the State treasurer, as and for taxes assessed against the Atlantic and Pacific Railroad Company in the State of California for the year 1893, by the State board of equalization of said State.

Respectfully,

J. W. REINHART,
JOHN J. McCOOK, AND
JOSEPH C. WILSON,
By C. N. STERRY,
Their Attorney.

38 I hereby acknowledge that the original of the above and foregoing notice was delivered to me at Sacramento, California, on the 2d day of April, 1894, and filed on said date.

E. P. COLGAN,
State Comptroller.

(Endorsed:) Filed Oct. 16th, 1896. W. J. Costigan, clerk.

Service of the within amended complaint admitted this 15th day of October, 1896.

W. E. FITZGERALD,
Attorney for Defendant.

39 In the Circuit Court of the United States for the Northern District of California, Ninth Circuit.

C. W. SMITH, Successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson, as Receiver- of the Atlantic and Pacific Railroad Company, and Receiver of the Atlantic and Pacific Railroad Company, Plaintiff,

vs.

LEVI RACKLIFFE, as Successor in Office to J. R. McDonald as Treasurer of the State of California, Defendant.

Demurrer to Amended Complaint.

Now comes the defendant, and demurring to the amended complaint of the plaintiff herein, for ground of demurrer says:

I.

That the court has no jurisdiction of the subject of the action.

40 II.

That the amended complaint does not state facts sufficient to constitute a cause of action.

Wherefore defendant prays to be hence dismissed with his costs.

W. F. FITZGERALD,
Attorney General, Attorney for Defendant.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

W. F. FITZGERALD,
Attorney General, Attorney for Defendant.

STATE OF CALIFORNIA, *County of Sacramento,* } *ss:*

Levi Rackliffe, as treasurer of State, being first duly sworn, deposes and says that he is the defendant in the above-entitled action, and that the foregoing demurrer is not interposed for delay.

LEVI RACKLIFFE.

Subscribed and sworn to before me this 6th day of November, 1896.

A. BETZ,
Phonographic Reporter for the Attorney General.

(Endorsed:) Filed November 6, 1896. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

41 Service of copy of the within demurrer admitted this 6th day of Nov., 1896.

C. N. STERRY,
E. S. PILLSBURY,
Attorneys for Pl'ffs.

At a stated term, to wit, the November term, A. D. 1897, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court-room in the city and county of San Francisco, on Friday, the 17th day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable William W. Morrow, circuit judge.

C. W. SMITH, Receiver, etc.,
vs.
LEVI RACKLIFFE, Treasurer, etc. } No. 11915.

Order Sustaining Demurrer.

Defendant's demurrer to the amended complaint of plaintiff, heretofore heard, and submitted to the court, having been fully considered, and the opinion of the court having been filed, it
42 is, in accordance with said opinion, ordered that said demurrer be, and the same hereby is, sustained.

On motion of F. D. Madison, Esq., attorney for plaintiff, it is ordered that plaintiff be, and hereby is, allowed ten days within which is to amend his complaint herein, if so advised.

In the Circuit Court of the United States in and for the Ninth Judicial Circuit, Northern District of California.

C. W. SMITH, as Receiver, etc., Plaintiff,
vs.
LEVI RACKLIFFE, as Treasurer, etc., Defendant.

Judgment of Dismissal.

In this action, the demurrer of the defendant heretofore interposed herein to plaintiff's amended complaint having been duly sustained by this court, and an order having been duly made and entered to that effect on the 17th day of December, 1897, and the plaintiff by his attorney on that day, in open court, having requested this court to allow him ten days within which to file an amended complaint, if he should consider that said complaint could
43 be amended so as to meet the order of the court in sustaining said demurrer, and said ten days having expired, and no amended complaint having been filed, and the defendant having requested that the default of plaintiff be entered, and that judgment be entered herein, dismissing said action and awarding defendant judgment against plaintiff for his costs of suit:

Wherefore, by reason of the law and the premises aforesaid, it is ordered that the default of plaintiff be entered, and it is ordered, adjudged, and decreed that said action be, and the same is hereby, dismissed, and that Levi Rackliffe, as treasurer of the State of California, the defendant herein, do have and recover of and from C. W. Smith, as successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson, as receivers of the Atlantic and Pacific Railroad Com-

pany, and receiver of the Atlantic and Pacific Railroad Company, the plaintiff herein, his costs and disbursements in said action.

Dated December 30th, 1897.

HAWLEY, *Judge.*

(Endorsed:) Filed December 30, 1897. Southard Hoffman, clerk.

44 In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

C. W. SMITH, etc., *vs.* LEVI RACKLIFFE, etc. } No. 11915.

Certificate to Judgment-roll.

I, Southard Hoffman, clerk of the circuit court of the United States, for the ninth judicial circuit, northern district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said circuit court, this 30th day of December, 1897.

[SEAL.] SOUTHARD HOFFMAN, *Clerk.*

(Endorsed:) Judgment-roll. Filed December 30, 1897. Southard Hoffman, clerk.

45 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

Hon. Joseph McKenna, circuit judge.

J. W. REINHART ET AL., Plaintiffs, *vs.* J. R. MCDONALD, Treasurer of the State of California, Defendant. } No. 11915.

MONDAY, *August* 17, 1896.

Opinion on Demurrer to Complaint and Motion to Dismiss.

Appearances.

C. N. Sterry, Esq., and E. S. Pillsbury, Esq., appeared for the plaintiffs.

W. F. Fitzgerald, Esq., attorney general of California, and W. H. Anderson, Esq., assistant attorney general of California, appeared for the defendant.

MCKENNA, *Circuit Judge:*

The allegations of the complaint in this action are: That the Atlantic and Pacific Railroad Company, of which the plaintiffs are

the receivers, is the lessee of a certain line of railroad situ-
46 ated in the State of California, known as the Southern Pacific Railroad Company; that in the operation of such railroad it was equiped with eighty-nine cars and locomotive engines, of the value of $56,810, which rolling stock it had in use and operation at all times along the line of its road; that all of said rolling stock has been assessed, and the tax thereon collected in the Territory of New Mexico; that the said rolling stock was used in interstate commerce carried on between the States of Illinois and California, that the railroad, leased from the Southern Pacific Railroad Company as aforesaid, was assessed by the State board of eq-alization to said Southern Pacific Railroad Company, and the assessment of said railroad, including the *pro rata* share of the entire rolling stock of the Southern Pacific in California, being levied thereon, was paid.

The action is brought against the treasurer of the State of California, in accordance with section 3669 of the Political Code, which enables suit to be brought against the treasurer of the State for taxes claimed to be illegal.

The defendant demurs to the complaint on the ground of want of jurisdiction of the court to maintain the action, and, also, on the ground that the complaint does not state a cause of action.

The principal point made on the first ground of the demurrer is that the suit is essentially one against the State of California, and that such suit cannot be maintained against the State without
47 its consent; and that the consent given in section 3669 of the Political Code is of suit brought only in the State courts.

The view that this is a suit against the State is presented by the attorney general with great strength and plausibility. But, even if the contention be true, I think it is a fair deduction from the authorities as from the principle that the right of suit against the treasurer of the State being given, it may be brought in the Federal courts when other grounds of jurisdiction exist, as they do in this case. I do not think it is necessary to review the cases; they are very numerous, and the care of counsel has cited all of them.

The claim of exemption from taxation of the property described in the complaint is based on the following grounds:

First. That the property is engaged in interstate commerce.

Second. That its situs is in New Mexico, where taxes on it have been paid.

Third. That the Atlantic and Pacific Railroad Company is not the owner of the railroad, and, under the constitution of the State of California, the rolling stock can only be assessed to the owner of the railroad.

The first two grounds are answered by the cases of Marye *v.* Baltimore and Ohio Railroad Company, 127 U. S., 117, and Pullman's Car Company *v.* Pennsylvania.

The constitution of the State of California is as follows:

48 SECTION 1, Article XIII. "All property of the State not exempt under the laws of the United States shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby de-

clared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership."

SECTION 10, Article XIII. "* * * The franchise, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State board of equalization, at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts."

These provisions seem to need no interpretation. The first section is so comprehensive that it can only be defined in terms of itself; and it certainly embraces—as it exactly and carefully says it embraces—all matters and things "capable of private ownership."

Section 10 provides a means for the assessment of certain kinds of those things, and it was said by the supreme court of California in People *v.* Sacramento Co., 59 Cal., 325, to be self-executing. But it is urged by the plaintiff that there must be an union of them in the same ownership as a condition of assessment. This view is supported by an ingenious and puzzling argument aided (or
49 apparently aided) by some remarks of Justice Harrison in People *v.* Central Pacific Railroad Company, 105 Cal., 587.

The learned justice said: "The franchise is a unit, and can be transferred only as a unit, and the rolling stock has no particular situs in any county, but, in connection with the roadway and road-bed, are essential for the enjoyment of the franchise, while the whole—the franchise, roadway, road-bed, rails, and rolling stock—constitute an entirety incapable of division."

The question and circumstances of that case were different from those of the case at bar. In that case the question before the court was the constitutionality of certain provisions of the political code of the State, making a class of railroads operated in more than one county. To sustain this classification it was necessary for the court to find, and the court did find, a difference in the condition of property which had situs (if I may so speak) in many counties—as the franchise or situs in no particular county—as rolling stock.

The constitution clearly made a class of certain species of property, and, besides, it was equally clear that if delinquent taxes were attempted to be collected on such property as on other property, embarrassments would necessarily arise. How, indeed, in the ordinary way, could the taxes be realized? How a sale or transfer be made in any particular county for its share of taxes apportioned under the constitution? It was truly said: "Even if the roadway within the county could be described, there could be no ap-
50 portionment to the several counties of the franchise, or of the rolling stock, which could serve as a description or be capable of transfer." Their value, or the value of either, could be apportioned and the taxes recovered by the action directed by section 3670 of the Political Code to be brought by the controller in the

name of the people of the State to collect the taxes upon property assessed by the State board of equalization. It was to illustrate this embarrassment, not to express a principle (neither necessary to his reasoning or to the points involved), which might exempt some of the property of the State from taxation that Justice Harrison used the language he did.

It is further urged against the legality of the taxes that the provisions of the constitution apply only to California railroads, and for this the case of Marye *v.* Baltimore and Ohio Railroad Company, *supra*, is relied on. The case was based on a bill in equity filed by the Baltimore and Ohio Railroad Company against the taxing officer of the State of Virginia, for the purpose of enjoining him from selling certain engines and cars, the property of the complainant, for the payment of a tax alleged to have been illegally assessed thereon. There was a decree in the circuit court granting the relief prayed for, from which the appeal was prosecuted.

The Baltimore and Ohio Railroad Company was a corporation organized under the laws of Maryland, and a citizen thereof, by virtue of whose charter its rolling stock was exempt from taxation. The line of its road did not at any point lie in the State of Virginia. It, however, connected with certain roads belonging
51 to corporations incorporated by various acts of the legislature of Virginia.

In the statement of the case the court said:

"The act of the General Assembly of the State of Virginia, under which the assessment and collection of these taxes were sought to be justified, is contained in section 20, c. 119, of the Acts of the Virginia Legislature, session of 1881–1882, being part of the taxing laws of the State originally enacted in 1870 and 1871, and continued with amendments to the present time. The material part of the act applicable to this case was as follows:

'19. Every railroad and canal company not exempted from taxation by virtue of its charter shall report annually on the first day of June, to the auditor of public accounts, all of its real and personal property of every description, as of the first day of February of each year, showing particularly in what county or corporation such property is located, and classifying the same under the following heads:

'First. Roadway and track, or canal bed.

'Second. Depots, depot grounds and lots, station buildings and fixtures, and machine shops.

'Third. Real estate not included in other classes.

'Fourth. Rolling stock, including passenger, freight, cattle or stock, baggage, mail, express, sleeping, palace, and all other cars owned by or belonging to the company, boats, machinery, and equipments, houses and appurtenances occupied by lock-gate keepers and other employees.

52 'Fifth. Stores.

'Sixth. Telegraph lines.

'Seventh. Miscellaneous property.

'Every such company shall report on or before the first day of

June of each year the gross and net receipts of the road or canal for the twelve months preceding the first day of February of each year, and in all cases the report shall be so made as to give the data on which the same is made. If such road or canal is only in part within the Commonwealth, the report shall show what part is within the Commonwealth and what proportion the same bears to the entire length of the road or canal, and shall apportion the receipts accordingly. The reports herein required shall be verified by the oath of the president or other proper officer. Upon the receipt of every such report it shall be the duty of the auditor of public accounts to lay the same before the board of public works, who shall, after thirty days' notice previously given to the president, treasurer, or other proper officer, proceed to ascertain and assess the value of the property so reported, upon the best and most reliable information that can be procured; and to this end shall be authorized and empowered to send for persons and papers should it be deemed necessary. A certified copy of the assessment, when made, shall be immediately forwarded by the secretary of the board to the president or other proper officer of every railroad or canal company so assessed, whose duty it shall be to pay into the treasury of the State, within sixty days after the receipt thereof, the tax which may
53 be imposed thereon by law. A company failing to make such report, or to pay the tax assessed upon its property, shall be immediately assessed, under the direction of the auditor of the public accounts, by any person appointed by him for the purpose, rating their real estate and rolling stock at twenty thousand dollars per mile; and a tax shall at once be levied on such value at the annual rate levied upon the value of the other property for the year. Such tax so levied, as well as the sum required to be paid upon the report hereinbefore mentioned, if the same be not paid at the time provided herein, shall be collected by the treasurer of some county in which such company owns property to whom the auditor may deliver the assessment or a copy thereof. The treasurer may distrain and sell any personal property of such company, and shall pay the taxes into the treasury within three months from the time of the assessment, or a copy as aforesaid may be delivered to him. The compensation of such treasurer to be the same as he receives for collecting other taxes in his county or corporation.'"

The case has a very strong resemblance to the one at bar, but it depended upon the interpretation of the Virginia statute which is differently expressed, and has specializing provisions which are not found in the California constitution. It was upon these special provisions the opinion was based.

Justice Mathews, speaking for the court, said:

"The terms of the act, indeed, include 'every railroad and canal company not exempted from taxation by virtue of its charter,' but that language, according to a general rule of interpretation,
54 must be confined to corporations deriving their authority from the laws of Virginia. It is apparent, also, from the other expressions contained in the law, as well as its whole purview, that it was intended to apply only to such domestic corporations as, in the

case of railroad companies, were the owners of railroads and the property usually appurtenant thereto, lying and being within the State."

The language of the California constitution is, "All property of the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law." * * *

The California constitution, therefore, applies to property without regard to its kind or ownership. It is only necessary that it should be "of the State." The limitations of the Virginia statute are not contained in the California constitution.

The demurrer is sustained, with leave to plaintiffs to amend within twenty days, if they shall be so advised; and the motion to dismiss is denied.

(Endorsed:) Filed August 17th, 1896. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

55 In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California. At Law.

C. W. SMITH, Successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson as Receivers of the Atlantic and Pacific Railroad Co., and Receivers of the Atlantic and Pacific Railroad Company, Plaintiff,
vs.
LEVI RACKLIFFE, as Successor in Office to J. R. McDonald as Treasurer of the State of California, Defendant.
No. 11915.

C. N. Sterry, Esq., attorney for plaintiff; E. S. Pillsbury, Esq., of counsel.

W. F. Fitzgerald, Esq., attorney general of the State of California.

Opinion on Demurrer to Amended Complaint.

MORROW, *Circuit Judge:*

56 This action was brought by the receiver of the Atlantic and Pacific Railroad Company, under the provisions of section 3669 of the Political Code of this State, to recover of the State treasurer certain moneys paid by that company into the State treasury for taxes upon rolling stock operated by it within this State. A demurrer to the original complaint having been sustained by Judge McKenna (Reinhart *v.* McDonald, 76 Fed. Rep., 403), the complainant has filed an amended complaint, containing a formal substitution of parties, and some changes in the verbiage of the complaint, but no substantial change in the material allegations of the original complaint.

It appears that the Atlantic and Pacific Railroad Company is a corporation organized and incorporated under the act of Congress, approved July 27, 1866 (14 Stats. at Large, 292). It had in opera-

tion, in 1893, a line of railroad from the city of Albuquerque, in the county of Bernalillo, in the Territory of New Mexico, through the Territory of Arizona to the Needles, in the county of San Bernardino, State of California, thence to Mojave, in the county of Kern, in the same State. The home and situs of the rolling stock of the road was located at Albuquerque, New Mexico. The line of this road in the State of California, from Mojave to the Needles, a distance of about 243 miles, was built and is owned by the Southern Pacific Railroad Company. In August, 1894, the Southern Pacific Railroad Company agreed to sell this road from Mojave to the Needles to the Atlantic and Pacific Railroad Company. The sale was to be consummated whenever the Southern Pacific Railroad Company was able to make clear title to the line of railway
57 discharged from certain liens. In the meantime, and until the consummation of the sale and payment of the purchase price, the Southern Pacific Railroad Company leased this line of railway to the Atlantic and Pacific Railroad Company for a period of thirty years at an annual rental. The lease provided that the Atlantic and Pacific Railroad Company should promptly pay and discharge all taxes and assessments which should thereafter become due upon said property or any part thereof, or might become in anywise due or owing in respect to the same.

In the year 1893 the State board of equalization of this State assessed the franchise, roadway, road-bed, rails, and rolling stock of the Southern Pacific Railroad Company in the State of California, including the line of railroad from Mojave to the Needles, so leased to the Atlantic and Pacific Railroad Company, and which was, at that time, being operated by the last-named company, and did also demand and require of the Atlantic and Pacific Railroad Company that it should make a return of all its personal property in the shape of rolling stock, etc., used in the operation of the line of road from Mojave to the Needles, leased from the Southern Pacific Railroad Company, and thereupon, and under protest, the Atlantic and Pacific Railroad Company returned to the board of equalization that it had in operation eighty-nine cars and locomotive engines of the value of $56,810, which it had in use and operated at times along the line of said road, and thereupon the board of equalization assessed said rolling stock at a total valuation of $125,000, and
58 imposed a tax of $2,272.80, which the railroad company paid to the State treasurer.

To recover this sum of $2,272.80, the present suit was brought against the State treasurer by the receiver of the railroad company.

The first demurrer, interposed by the attorney general of the State, raised the question of jurisdiction of the court, to entertain the action, because it was in effect a suit against the State of California. The demurrer also placed in issue the sufficiency of the complaint in stating a cause of action. The court held that it had jurisdiction of the action, but sustained the demurrer on the other ground. The sufficiency of the complaint involved the question whether, under section 3665 of the Political Code of California, the

State board of equalization had the power to assess the rolling stock of a railroad corporation, where the corporation is not located in the State and does not own the line of road upon which the rolling stock is used, but holds the road under a lease. The section provides, among other things, as follows:

"The board must assess the franchise, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county. * * * Assessment must be made to the corporation, person, or association of persons owning the same. The depots, stations, shops, and buildings erected upon the space covered by the right of way, and all other property owned by such person, corporation, or association of persons, are assessed by the assessor of the county where they are situate."

It was contended that, as the Atlantic and Pacific Railroad
59 Company was not the owner of the line of railroad from Mojave to the Needles the rolling stock on that road could not be assessed to that corporation. In other words, there must be a union in the ownership of the line of road and the rolling stock as a condition of assessment. The court held that the tax was legal under the constitution of the State, which provides, in section 1, article 13, that "all property of the State, not exempt under the laws of the United States, shall be taxed in proportion to its value to be ascertained as provided by law."

In support of the present demurrer, it is contended that the State board of equalization had no jurisdiction under the constitution of the State, to assess rolling stock belonging to a railroad which is not operated in more than one county of the State; that, if such rolling stock happens to be in the State under such circumstances as to require that it should be taxed under the constitution and the laws of the State, the taxes required to be paid by it must be levied upon an assessment made by the local assessor and not by the State board of equalization. It is contended, further, that this proposition was not presented by counsel, or considered by the court upon the first demurrer. The sufficiency of the complaint certainly involved this question, and, in my opinion, it was presented by counsel in their briefs.

But assuming that the question was not considered or determined by the court, I am of the opinion that the assessment is in accordance with the constitution and law of the State. Section 10 of article 13 of the constitution of the State provides: "All
60 property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State board of equalization, at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts."

Section 3665 of the Political Code as we have seen, requires the board of equalization to assess rolling stock of railroads operated in more than one county, and the assessment must be made to the corporation, person, or association of persons owning the same.

This is an assessment against a railroad corporation on rolling stock operated by such corporation over a line of railroad in more than one county in the State, and, in my opinion, comes within the jurisdiction conferred upon the board of equalization by the constitution. The demurrer will be sustained.

(Endorsed:) Opinion of demurrer to amended complaint. Filed Dec. 17, 1897. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

61 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

C. W. SMITH, as Successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson as Receivers of the Atlantic and Pacific Railroad Company, and Receiver of the Atlantic and Pacific Railroad Company, Plaintiff,

vs.

LEVI RACKLIFFE, as Treasurer of the State of California, Defendant.

Petition for Writ of Error.

To the honorable justices of the United States circuit court of appeals, ninth circuit:

Now comes C. W. Smith, as receiver of the Atlantic and Pacific Railroad Company, a corporation duly created and incorporated under the act of Congress approved July 27, 1866, by C. N. Sterry, his attorney, and complains that in the record and proceedings, and also in the rendition of judgment in a suit wherein C. W. Smith, as such receiver, and as successor of J. W. Reinhart, John J.
62 McCook, and Joseph C. Wilson, as receivers of the Atlantic and Pacific Railroad Company, is plaintiff, and Levi Rackliffe, as treasurer of the State of California, is defendant, tried in the circuit court of the United States for the northern district of California, and in which a judgment was rendered against the plaintiff, as such receiver, on the 30th day of December, 1897, dismissing said action and entering and rendering a judgment for costs therein against the said C. W. Smith, as such receiver as plaintiff, manifest error hath intervened, to the great damage of the said C. W. Smith as such receiver:

Wherefore, the said C. W. Smith, as such receiver, prays for the allowance of a writ of error, and such other process as may cause the errors committed in the rendition of said judgment to be corrected by the United States circuit court of appeals for the ninth circuit.

C. N. STERRY,

Attorney for Plaintiff, C. W. Smith, as Receiver of the Atlantic and Pacific Railroad Company.

Order Allowing Writ of Error.

A writ of error is allowed as herein prayed for.
Dated December 30, 1897.

HAWLEY, *Judge.*

(Endorsed:) Filed Dec. 30, 1897. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

63 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

C. W. SMITH, as Successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson as Receivers of the Atlantic and Pacific Railroad Company, and Receiver of the Atlantic and Pacific Railroad Company, Plaintiff,

vs.

LEVI RACKLIFFE, as Treasurer of the State of California, Defendant.

Assignment of Errors.

Comes now C. W. Smith, successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson, receivers of the Atlantic and Pacific Railroad Company, and receiver of the Atlantic and Pacific Railroad Company, and complains of the defendant, Levi Rackliffe, as treasurer of the State of California, for that the said defendant, on the 30th day of December, 1897, in the United States circuit court for the ninth circuit, northern district of California, recovered a judgment by the consideration of said court against this
64 plaintiff dismissing an action therein pending, wherein this plaintiff was plaintiff and the said Levi Rackliffe, as such treasurer, was defendant; a copy of the record of said judgment and the proceedings in said cause, duly certified, is attached hereto, marked Exhibit "A," and made a part hereof; and the said plaintiff avers that there is error in said record and proceedings, to wit:

1st. That the court erred in sustaining the demurrer to the amended complaint of the plaintiff filed herein, as will fully appear from an inspection of said record.

2d. That said court erred in rendering a judgment in favor of the defendant and against the plaintiff, upon the sustaining of said demurrer, as will fully appear by reference to said record.

Wherefore, the plaintiff, C. W. Smith, successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson, as receivers of the Atlantic and Pacific Railroad Company, as such receiver, prays that a writ of error be issued, in order that the error above stated and set forth, if any hath been, will be duly corrected and full and speedy justice done the parties aforesaid in this behalf and that the

plaintiff be restored to all rights lost by the erroneous rulings of the court herein complained of.

C. N. STERRY,
Attorney for Plaintiff, C. W. Smith, as Receiver of the Atlantic and Pacific Railroad Company.

(Endorsed:) Filed Dec. 30, 1897. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

65 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

C. W. SMITH, as Successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson as Receivers of the Atlantic and Pacific Railroad Company, as Receiver of the Atlantic and Pacific Railroad Company, Plaintiff,
vs.
LEVI RACKLIFFE, as Treasurer of the State of California, Defendant.

Bond on Writ of Error.

Know all men by these presents, that we, the Santa Fe Pacific Railroad Company, a corporation, incorporated under the act of Congress approved March 3d, 1897, as principal, and F. B. Henderson and J. B. Alexander, are held and firmly bound unto the defendant, Levi Rackliffe, as treasurer of the State of California, his successor in office and assigns, in the sum of five hundred
66 dollars ($500.00), for the payment of which in lawful money of the United States of America, well and truly to be made, we bind ourselves, our heirs, executors, and assigns firmly by these presents.

The conditions of the above obligation are such, that whereas, on the 30th day of December, 1897, a judgment dismissing said above-entitled action and adjudging that the plaintiff, C. W. Smith, as such receiver, pay to the defendant, as the costs taxed for and on behalf of the defendant, the sum of — was duly made and entered.

And whereas, that plaintiff desires to appeal from said judgment dismissing said cause and taxing said cost to him, to the United States circuit court of appeals for the ninth judicial district, and has commenced proceedings in error for the purpose of appealing from said judgment:

Now, therefore, if the plaintiff shall duly prosecute said appeal with diligence and without delay, and shall pay all damages and costs if he fail to make his plea good in said proceedings in error, then and in such case this obligation shall be null and void; otherwise to remain in full force and effect.

SANTA FE PACIFIC RAILROAD COMPANY,
By G. F. H. OTTERHOFF, JR.,
Its Treasurer.
F. B. HENDERSON.
J. B. ALEXANDER.

67 STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

F. B. Henderson and J. B. Alexander, each being severally sworn, for himself says:

That he is a citizen and resident of Los Angeles, State of California; and that he is worth the sum of five hundred dollars ($500.00) over and above all liabilities and exemptions, and that he is a freeholder in said city, county and State.

F. B. HENDERSON.
J. B. ALEXANDER.

Subscribed and sworn to before me this 31st day of December, A. D. 1897.

[SEAL.] J. L. B. HAMILTON,
Notary Public in and for the County of Los Angeles, State of California.

The within bond is hereby approved.
Dated January 3, 1898.

WM. W. MORROW, *Judge.*

(Endorsed:) Filed Jan. 3, 1898. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

68 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

C. W. SMITH, as Successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson as Receivers of the Atlantic and Pacific Railroad Company, and Receiver of the Atlantic and Pacific Railroad Company, Plaintiff,
vs.
LEVI RACKLIFFE, as Treasurer of the State of California, Defendant. } No. 11915.

Clerk's Certificate to Transcript.

I, Southard Hoffman, clerk of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, do hereby certify the foregoing sixty-one (61) written pages, numbered from 1 to 61, inclusive, to be a full, true, and correct copy of the record and proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $45.60, and that said amount was paid by C. N. Sterry, Esq., attorney for plaintiff.

69 In testimony whereof, I have hereunto set my hand and affixed the seal of said circuit court this 6th day of January, A. D. 1898.

[SEAL.] SOUTHARD HOFFMAN,
Clerk U. S. Circuit Court, Ninth Judicial Circuit, Northern District of California.

In the United States Circuit Court of Appeals for the Ninth Circuit.

C. W. SMITH, as Successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson as Receivers of the Atlantic and Pacific Rail road Company, and Receiver of the Atlantic and Pacific Railroad Company, Plaintiff, *vs.* LEVI RACKLIFFE, as Treasurer of the State of California, Defendant.	In Error to the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the northern district of California, Greeting:

70 Because in the record and proceedings, and also in the rendition of the judgment in an action which is in said circuit court before you, between C. W. Smith, as successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson, as receivers of the Atlantic and Pacific Railroad Company, and as receiver of the Atlantic and Pacific Railroad Company, plaintiff, and Levi Rackliffe, as treasurer of the State of California, a manifest error hath happened, to the great damage of the said C. W. Smith, as such receiver, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly made, to send the record and proceedings aforesaid, with all the information concerning the same, to the United States circuit court of appeals for the ninth circuit, together with this writ, so that you have the same at the office of the clerk of said circuit court of appeals on the 12th day of January, 1898, in said circuit court of appeals to be then and there held; that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 30th day of December, in the year

of our Lord one thousand eight hundred and ninety-seven
71 and of the Independence of the United States the one hundred and twenty-first.

[SEAL.] SOUTHARD HOFFMAN,
Clerk of the United States Circuit Court for the Northern District of California.

The above writ of error is hereby allowed.

THOMAS P. HAWLEY, *Judge.*

Receipt of a copy of the within writ of error admitted this 31st day of December, 1897.

W. F. FITZGERALD,
Attorney General of California, Attorney for Levi Rackliffe, as Treasurer, etc., Defendant.

(Endorsed:) Filed December 31, 1897. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

Return to Writ of Error.

The answer of the judges of the circuit court of the United States of the ninth judicial circuit in and for the northern district of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States circuit court of appeals for the ninth circuit within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the court:

[SEAL.] SOUTHARD HOFFMAN, *Clerk.*

72 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To Levi Rackliffe, as treasurer of the State of California, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the ninth circuit, to be held at the city of San Francisco, in the State of California, on the 12th day of January, 1898, pursuant to a writ of error on file in the clerk's office of the circuit court of the United States for the ninth judicial circuit in and for the northern district of California, wherein C. W. Smith, as successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson as receivers of the Atlantic and Pacific Railroad Co., and receiver of the Atlantic and Pacific Railroad Company, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment given, made, and rendered against the said C. W. Smith, as such receiver of the Atlantic and Pacific Railroad Company, in the said writ of error mentioned, should not

be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas P. Hawley, United States district judge for the district of Nevada, holding United States circuit court for the northern district of California, this 30th day of December, in the year of our Lord one thousand eight hundred and
73 ninety-seven, and of the Independence of the United States the one hundred and twenty-first.

THOMAS P. HAWLEY, *Judge.*

Receipt of a copy of the within citation admitted this 31st day of December, 1897.

W. F. FITZGERALD,
Attorney General of California, Attorney for Levi Rackliffe, as Treasurer, etc., Defendant.

(Endorsed:) Filed December 31, 1897. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

(Endorsed:) No. 422. In the United States circuit court of appeals for the ninth circuit. C. W. Smith, as successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson, as receivers of the Atlantic and Pacific Railroad Company, and receiver of the Atlantic and Pacific Railroad Company, plaintiff in error, *v.* Levi Rackliffe, as treasurer of the State of California, defendant in error. Transcript of record. In error to the United States circuit court of the ninth judicial circuit, in and for the northern district of California. Filed Jan. 6, 1898. Frank D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

74 In the United States Circuit Court of Appeals for the Ninth Circuit.

C. W. SMITH, as Successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson as Receivers of the Atlantic & Pacific R. R. Co., and Receiver of the Atlantic & Pacific R. R. Company, Plaintiffs in Error, *v.* LEVI RACKLIFFE, as Treasurer of the State of California, Defendant in Error.	No. 422. Filed May 3, 1898.

1. Jurisdiction of Federal courts—Action against State officer.—An action by a citizen of another State or by an alien against a State treasurer to recover taxes alleged to have been illegally collected by the State is, in effect, an action against the State, and cannot be maintained in a Federal court in view of the prohibition of the eleventh amendment.
2. Same.—Pol. Code Cal., sec. 3669, which provides for bringing suits against the State to recover taxes illegally collected, is not to be construed as a consent that such suits may be brought in the Federal courts, since it contains provisions

wholly inapplicable to the procedure of the Federal courts, among them being a provision that, at a certain stage of the case, the treasurer may cause it to be removed into the superior court for the county of Sacramento.

3. Same—Citizenship—Receivers of corporations.—It is only where the jurisdiction of the Federal courts depends upon diverse citizenship that the citizenship of a receiver of an incorporated party is material. If the jurisdiction is asserted on
75 any other ground, the receiver stands upon the same footing as the corporation itself.

4. Same.—The provision in the Constitution giving the Federal courts jurisdiction of controversies "between a State and citizens of another State, * * * and between a State, or the citizens thereof, and foreign States, citizens or subjects" (article 3, sec. 2), does not include an action against a State by a corporation created by act of Congress.

Appeal from the circuit court of the United States for the northern district of California.

C. N. Sterry and E. S. Pillsbury, for plaintiff in error.
W. F. Fitzgerald and W. H. Anderson, for defendant in error.

Before Gilbert and Ross, circuit judges, and Hawley, district judge.

GILBERT, *Circuit Judge:*

The plaintiff in error, as receiver for the Atlantic & Pacific Railroad Company, was the plaintiff in an action which was brought against the State treasurer of the State of California, under section 3669 of the Political Code of California, to recover $2,272.80 taxes paid by said company for the year 1893, alleging, in his complaint, that said railroad company was operating, under a lease from the Southern Pacific Railroad Company, a certain line of railroad in the State of California, over which leased line the lessor company also ran its trains; that said line of road, and the rolling stock thereon, owned and operated by the Southern Pacific Railroad Company, were returned by that company to the State board of equalization for assessment for the year 1893, and were assessed to said Southern Pacific Company at a certain apportioned valuation per mile for all of the road which is covered by the lease; that the rolling stock on said leased road, owned and operated by the Atlantic & Pacific Railroad Company, was returned under protest by that company to the State board of equalization, and was by said board assessed for the year 1893 to its said owner; that each of said companies paid the taxes levied upon its property; that the said rolling stock of the Atlantic & Pacific Railroad Company so assessed was not used alone upon the line of the leased road in California, but was used in said company's traffic in other States, and was
76 constantly coming and going into and out of said State; and that the Atlantic & Pacific Railroad Company's headquarters and the situs of its rolling stock is in the county of Bernalillo, N. M.,

in which county all of its rolling stock was returned for taxation in 1893; that said assessment on the rolling stock of both companies using said road resulted in double taxation. The action was begun in the name of J. W. Reinhart, the former receiver of said road, and against J. R. McDonald, then the State treasurer. To the said complaint a demurrer was interposed, upon the grounds—first, that the court had no jurisdiction of the subject-matter of the action; and, second, that the complaint failed to state facts sufficient to constitute a cause of action. The circuit court, McKenna, J., sustained the demurrer upon the second ground, but disposed of the question of the jurisdiction in the following language:

"The view that this is a suit against the State is presented by the attorney general with great strength and plausibility. But, even if the contention be true, I think it is a fair deduction from the authorities, as from principle, that, the right of suit against the treasurer of the State being given, it may be brought in the Federal courts when other grounds of jurisdiction exist, as they do in this case. I do not think it is necessary to review the cases. They are very numerous, and the care of counsel has cited all of them." Reinhart *v.* McDonald, 76 Fed., 403.

Upon writ of error from this court, the plaintiff in error contends that the circuit court erroneously sustained the demurrer, and the defendant in error again raises the objection which was presented in the lower court, that the court is without jurisdiction of the subject-matter of the action upon the ground that it is an action against the State of California, and subject to the inhibition of the eleventh amendment to the Constitution of the United States, which provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." There can be no doubt that the action, although nominally against the State treasurer, is in fact an action against the State of California. From the time of the adoption of the eleventh amendment the Supreme Court
77 of the United States has held that it should be construed fairly and liberally, and in consonance with its manifest purpose, and has established the doctrine that when "the nominal defendants have no personal interest in the subject-matter of the suit, but defend only as representing the State, the State is the real party against whom the relief is sought, and this suit is substantially within the prohibition of the eleventh amendment. Hagood *v.* Southern, 117 U. S., 52; 6 Sup. Ct., 608; Louisiana *v.* Jumel, 107 U. S., 711; 2 Sup. Ct., 128; *In re* Ayers, 123 U. S., 443; 8 Sup. Ct., 164; Louisiana *v.* Steele, 134 U. S., 230; 10 Sup. Ct., 511. *In re* Ayers, 123 U. S., 443; 8 Sup. Ct., 164, Mr. Justice Matthews said of the purpose of the eleventh amendment:

"It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that

the course of their public policy and administration of their public affairs should be subject to, and controlled by, the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the eleventh amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as to effectually accomplish the substance of its purpose. In this spirit, it must be held to cover, not only suits brought against a State by name, but those also against its officers, agents, and representatives, where the State, though not named as such, is, nevertheless, the only real party against which alone, in fact, the relief is asked, and against which the judgment or decree effectively operates."

The present case comes clearly within the line of cases to which these words apply. It is a case in which the State of California is alone interested as defendant. No personal relief is sought as against the State treasurer, no act of his is brought in question, and no official misconduct is charged against him. So far as he is concerned, the action is purely impersonal. It was originally begun against McDonald, his predecessor in office. It is the aim of
78 the action to recover from the State treasurer, in his official capacity only, money which has been paid to the State for taxes, and mingled with other funds of the State. The money which the treasurer receives as such is kept by him in the vaults of the State treasury. It is so required by subdivision 1 of section 452 of the Political Code. If a judgment were rendered for plaintiff in the action, the treasurer, upon the controller's warrant, would be required to repay the tax money out of taxes so illegally collected, and to pay the costs out of the general fund of the treasury. The money sued for was not originally paid to the treasurer. It did not pass through his hands, but came into the treasury through other officers. The State is the only party in interest.

But, notwithstanding the eleventh amendment, the State may, by an act of its legislature, permit itself to be sued, either in a Federal court or in its own courts. It is contended by the plaintiff in error that such permission has been granted in the present case by the provisions of section 3669 of the Political Code of California, which reads as follows:

"SEC. 3669. Each corporation, person, or association assessed by the State board of equalization, must pay to the State treasurer upon the order of the controller, as other moneys are required to be paid into the treasury, the State and county, and city and county, taxes each year levied upon the property so assessed to it or him by said board. Any corporation, person, or association, dissatisfied with the assessment made by the board, upon the payment of the taxes due upon the assessment complained of, and the five per cent. added, if to be added, on or before the first Monday in February, and the filing of notice with the controller of an intention to begin an action, may, not later than the first Monday of February, bring an action against the State treasurer for the recovery of the amount of taxes and percentage so paid to the treasurer, or any part thereof, and in

the complaint may allege any fact tending to show the illegality of the tax, or the assessment upon which the taxes are levied, in whole or in part. A copy of the complaint and of the summons must be served upon the treasurer within ten days after the complaint has been filed, and the treasurer has thirty days in which to demur or answer. At the time the treasurer demurs or answers he may demand that the action be tried in the superior court of the county of Sacramento. The attorney general must defend the action. The provisions of the Code of Civil Procedure relating to pleading, proofs, trials, and appeals are applicable to the proceedings herein provided for. If the final judgment be against the treasurer, upon presentation of a certified copy of such judgment to the controller, he shall draw his warrant upon the State treasurer, who must pay to the plaintiff the amount of the taxes so declared to have been illegally collected, and the cost of such action, audited by the board of examiners, must be paid out of any money in the general fund of the treasury, which is hereby appropriated, and the controller may demand and receive from the county, or city and county, interested, the proportion of such costs, or may deduct such proportion from any money then or to become due to said county, or city and county. Such action must be begun on or before the first Monday in February of the year succeeding the year in which the taxes were levied, and a failure to begin such action is deemed a waiver of the rights of action."

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By this statute the State of California has made a general provision whereby it consents to be sued in its own courts in actions of the nature of the case at bar. Has it consented to be sued in the Federal court? The State has the unquestioned right to select the forum in which it shall be sued, to prescribe the manner in which the suit shall be conducted, and to impose upon the prosecution of the action any condition that may be deemed proper. It may even retract its permission to be sued after an action has been begun. Railroad Co. *v.* Alabama, 101 U. S., 832. Examining the section just quoted, it will be seen that conditions are imposed which are wholly incompatible with a consent to be sued in the United States courts. It is made a condition of the action, that at the time when the treasurer demurs or answers, he may demand that the case be tried in the superior court of the county of Sacramento. That condition is a valid one, and it conserves a substantial right to the State. It could not be complied with in an action in the United States court. No cause can be transferred from the United States circuit court for the northern district of California to the superior court of the State of California for Sacramento county. Again, it is provided in the same section that "the provisions of the Code of Civil Procedure, relating to pleadings, proofs, trials and appeals, are applicable to the proceedings herein provided for."

Although practice in the Federal courts conforms as nearly as may be to that of the State courts in actions at law, there are certain features in which their procedure is controlled by acts of Congress, from which the Federal courts are not at liberty to deviate in response to any provision of a State statute, and the

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clause of the language just quoted in reference to appeals could have no application whatever in a proceeding in the United States court. By this provision in regard to appeals, it was clearly the intention of the legislature to make the supreme court of the State of California the court of last resort to pass upon all questions which might arise in such an action. It was intended that the rights of litigants in such a suit should be subject to the construction which that court should finally adopt. That provision secures to the State the most substantial right which is conserved to it in the section just quoted, and presents an insurmountable obstacle to the prosecution of the action in a court of the United States.

But it is urged by the plaintiff in error that the Atlantic & Pacific Railroad Company is not a citizen of another State, nor a citizen or subject of a foreign State, but is a corporation created under an act of Congress for the express purpose of acting as an agent for the Federal government, and is therefore not among those from whom, by the terms of the 11th amendment, the power to sue a State is withheld. The receiver stands upon the footing of the corporation itself. If the corporation had the right to sue the State of California, the receiver undoubtedly has succeeded to the right. It is only where the jurisdiction of the United States courts depends upon diverse citizenship that the citizenship of the receiver is to be regarded. New Orleans *v.* Gaines' Adm'r, 138 U. S., 595; 11 Sup. Ct., 428; American Nat. Bank *v.* National Benefit & Casualty Co., 70 Fed., 420; Brisenden *v.* Chamberlain, 53 Fed., 307. The effect of the eleventh amendment was to overrule the decision of the supreme court in the case of Chisholm *v.* Georgia, 2 Dall., 419, in which it had been said, under the terms of article 3 of the constitution, extending the judicial power of the United States to controversies between a State and the citizens of another State, that a State was subject to a suit by a citizen of another State. Said Mr. Jus-
81 tice Matthews *In re* Ayers, above cited: "The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." In Hans *v.* Louisiana, 134 U. S., 1; 10 Sup. Ct., 504, it was held that the purpose of the eleventh amendment was to recognize the sovereignty of the State, and to declare that the judicial power of the United States was never intended by the framers of the Constitution to extend to suits by individuals against a State, and that the amendment should not be so construed as to inhibit only suits at the instance of the particular classes of citizens named therein, but that it applied as well to suits against a State by its own citizens. The jurisdiction of the court in that case was invoked upon the ground that a Federal question was involved in the controversy. The principles announced in the decision are conclusive of the question which is now before us. But we find a further and complete answer to the contention of the plaintiff in error. The jurisdiction of the United States court in the present case is not invoked upon the ground that the controversy presents a case arising under the Constitution or laws of the United States. Nor can jurisdiction be claimed upon the

ground of the diverse citizenship of the parties, since, as we have seen, the State itself is a party. It must rest upon some other grant of jurisdiction. The only other grant under which it could be claimed is that which is contained in section 2 of article 3 of the Constitution, declaring that the judicial power of the United States shall extend to controversies "between a State and citizens of another State, * * * and between a State or the citizens thereof and foreign States, citizens or subjects." The plaintiff in error must find in this provision his right to proceed in a Federal court, and if the Atlantic & Pacific Railroad Company is not a citizen of a State, or a citizen or subject of a foreign State, the controversy is not among those of which jurisdiction is conferred upon the United States courts by the Constitution. It follows that the circuit court erroneously entertained jurisdiction of the cause. For want of jurisdiction the judgment of dismissal is affirmed.

Endorsed: Opinion. Filed May 3, 1898. F. D. Monckton, clerk.

82 United States Circuit Court of Appeals for the Ninth Circuit.

C. W. SMITH, as Successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson as Receivers of the At. & Pac. R. R. Co., and Receiver of the Atlantic & Pac. R. R. Company, Plaintiff in Error,
v.
LEVI RACKLIFFE, as Treasurer of the State of California, Defendant in Error.
} No. 422.

In error to the circuit court of the United States for the northern district of California.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of California and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed.

(Endorsed:) Judgment. Filed May 3, 1898. F. D. Monckton, clerk.

83 In the United States Circuit Court of Appeals for the Ninth Circuit.

C. W. SMITH, Successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson as Receivers of the Atlantic & Pacific Railroad Company, as Receiver of the Atlantic & Pacific Railroad Company, Plaintiff in Error,

v.

LEVI RACKLIFFE, as Successor in Office to J. R. McDonald, as Treasurer of the State of California, Defendant in Error.

No. 422. Stipulation.

It is hereby stipulated and agreed by and between W. F. Fitzgerald, as attorney general of the State of California and as representing Levi Rackliffe, late treasurer of the State of California, and who is now authorized to and does represent W. S. Green, the present treasurer of the State of California, and C. W. Smith, as receiver of the Atlantic & Pacific Railroad Company, plaintiff in the above-entitled cause, as follows, to wit:

Whereas the defendant in the above-entitled cause, Levi Rackliffe, departed this life on April 21, 1898; and

Whereas W. S. Green was, on the 22nd day of April, 1898, duly and legally appointed his successor in office, and the said Green did, on the 22nd day of April, 1898, duly qualify as the treasurer of the State of California and entered upon the discharge of his duties as such treasurer, and has since that time been and now is the duly appointed, qualified, and acting treasurer of the State of California and successor in office of the defendant, Levi Rackliffe:

Now, therefore, it is stipulated and agreed by and between
84 said parties that the said W. S. Green shall be substituted as defendant in the above-entitled cause of action by the United States circuit court of appeals, and that he shall appear upon the records in said cause as having been substituted as defendant therein on and since the 22nd day of April, 1898, and that all proceedings had in said court subsequent to such date shall be deemed to have been had with him as a party to such suit, and said action shall be revived and proceed and remain as an action pending against him as treasurer of the State of California, to the same extent and as completely as though he had been treasurer from the commencement of it.

C. N. STERRY,
Attorney for Plaintiff in Error.
W. F. FITZGERALD,
Attorney General of the State of California.

(Endorsed:) Stipulation as to substitution of W. S. Green as defendant in error. Filed Oct. 10, 1898. F. D. Monckton, clerk.

85 At a stated term, to wit, the October term, A. D. 1898, of the United States circuit court of appeals for the ninth cir-

cuit, held at the court-room, in the city and county of San Francisco, on Monday, the tenth day of October, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable Thomas P. Hawley, district judge.

C. W. SMITH, as Successor to J. W. Reinhart *et al.*, etc., Receiver of the Atlantic & Pacific Railroad Company, Plaintiff in Error,
v.
LEVI RACKLIFFE, as Treasurer of the State of California, Defendant in Error. } No. 422.

It appearing to the court that the defendant in error in the above-entitled cause, Levi Rackliffe, late treasurer of the State of California, died on April 21, 1898, and that on April 22, 1898, W. S. Green was duly and legally appointed the successor in office of the said Levi Rackliffe, deceased, and duly qualified as the treasurer of the State of California and entered upon the discharge of his duties as such treasurer, and has since that time been and now is the duly appointed, qualified, and acting treasurer of the State of California and successor in office of the said Levi Rackliffe, and that it has been stipulated and agreed by and between C. N. Sterry, Esq., as attorney for the plaintiff in error in the above entitled cause, and W. F. Fitzgerald, Esq., attorney general of the State of California, who represented in the above-entitled cause the said Levi Rackliffe, late treasurer of the State of California, and who is now authorized to and does represent W. S. Green, the present treasurer of the State of California, that the said W. S. Green shall be substituted as defendant in the above-entitled cause, and that he shall appear upon the records in said cause as having been substituted as defendant therein on and since the 22nd day of April, 1898, and that all proceedings had in this court subsequent to said date shall be deemed to have been had with him as a party to said suit, and that said cause shall be revived and proceed and remain as a cause pending against him as treasurer of the State of California to the same extent and as completely as though he had been treasurer from the commencement thereof:

Now, on motion of E. S. Pillsbury, Esquire, it is ordered, pursuant to the said stipulation, that the said W. S. Green, as treasurer of the State of California and successor in office to the said Levi Rackliffe, be, and he is hereby, substituted a defendant in error in the above-entitled cause as defendant in error *nunc pro tunc* as of the 22nd day of April, 1898, and that all proceedings had in this court subsequent to the 22nd day of April, 1898, shall be deemed to have been had with him, the said W. S. Green, as treasurer of the State of California, to the same extent and as completely as though he had been treasurer from the commencement of the above-entitled cause.

86 In the United States Circuit Court of Appeals for the Ninth Circuit.

C. W. SMITH, Successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson as Receivers of the Atlantic & Pacific Railroad Company, as Receiver of the Atlantic & Pacific Railroad Company, Plaintiff in Error,

vs.

LEVI RACKLIFFE, as Successor in Office to J. R. McDonald as Treasurer of the State of California, Defendant in Error.

} No. 422.

Stipulation.

It is hereby stipulated and agreed by and between Tirey L. Ford, as attorney general of the State of California, who is now authorized to and does represent Truman Reeves, the present treasurer of the State of California and successor in office of W. S. Green, ex-treasurer of the State of California, and C. N. Sterry, attorney for C. W. Smith, as receiver of the Atlantic & Pacific Railroad Company, plaintiff in the above-entitled cause, as follows, to wit:

Whereas the defendant in the above-entitled action, W. S. Green, was such treasurer down to the 2nd day of January, 1899, at 12 o'clock m.; and

Whereas, at a general election held in the State of California on the 8th day of November, 1898, Truman Reeves was duly elected to succeed the said W. S. Green as such treasurer of the State of California, and thereafter, to wit, on the 2nd day of January, 1899, at 12 o'clock m., did succeed the said W. S. Green in office, as aforesaid, and ever since has been and now is the duly elected, qualified, and acting treasurer of the State of California:

87 Now, therefore, it is stipulated and agreed by and between said parties that the said Truman Reeves shall be substituted as defendant in the above-entitled cause of action by the United States circuit court of appeals, and that he shall appear upon the records in said cause as having been substituted as defendant therein on and since the 2nd day of January, 1899, at 12 o'clock m., and that all proceedings had in said court subsequent to such date shall be deemed to have been had with him as a party to such suit, and said action shall be revived and proceed and remain as an action pending against him as treasurer of the State of California to the same extent and as completely as though he had been treasurer from the commencement of it.

C. N. STERRY,
Attorney for Plaintiff in Error.
TIREY L. FORD,
Attorney General of the State of California,
By GEO. A. STURTEVANT,
Deputy Attorney General.

(Endorsed:) Stipulation substituting Truman Reeves for W. S. Green. Filed Feb. 7, 1899. F. D. Monckton, clerk.

88 At a stated term, to wit, the October term, A. D. 1898, of the United States circuit court of appeals for the ninth circuit, held at the court room, in the city and county of San Francisco, on Tuesday, the seventh day of February, in the year of our Lord one thousand eight hundred and ninety-nine.

Present: The Honorable William B. Gilbert, circuit judge; the Honorable Erskine M. Ross, circuit judge; the Honorable William W. Morrow, circuit judge.

C. W. SMITH, as Successor to J. W. Reinhart *et al.*, etc., Receiver of the Atlantic & Pacific Railroad Company, Plaintiff in Error,
vs.
W. S. GREEN, as Treasurer of the State of California (Substituted, etc.), Defendant in Error.
} No. 422.

Now, at the February, 1899, session of this court, the plaintiff above named appeared, by his attorney, C. N. Sterry, in open court, and thereupon there was presented to the court a stipulation, signed by the respective counsel, containing, among other things, the statement that on the 2nd day of January, 1899, Truman Reeves became the duly elected, qualified, and acting treasurer of the State of California, and the said stipulation further provided that the said Truman Reeves as such treasurer should be substituted as defendant in the above-entitled cause as from and after January 2, 1899.

Thereupon, upon motion of the plaintiff, based upon said stipulation, it is ordered and adjudged that Truman Reeves, as treasurer of the State of California, be, and he is hereby, declared to be the defendant in the above-entitled action, substituted as such in his official capacity in the place and stead of W. S. Green, said substitution to take effect as of January 2nd, 1899.

89 In the United States Circuit Court of Appeals for the Ninth Circuit.

C. W. SMITH, as Successor of J. W. Reinhart, John J. McCook, and Joseph C. Wilson as Receivers of the Atlantic & Pacific Railroad Company, and Receiver of the Atlantic & Pacific Railroad Company, Plaintiff in Error,
vs.
TRUMAN REEVES, as Treasurer of the State of California and Successor in Office of W. S. Green as Treasurer of the State of California, and Successor in Office of the Late Levi Rackliffe, Defendant in Error.

Petition for Writ of Error.

Comes now C. W. Smith, successor of J. W. Reinhart, John J. McCook, and Joseph C. Wilson as receivers of the Atlantic & Pa-

cific Railroad Company, and receiver of the Atlantic & Pacific Railroad Company, plaintiff in error, by C. N. Sterry, his attorney, and complains that in the record and proceedings, and also in the rendition of the judgment in the suit pending in the above-entitled court, wherein C. W. Smith, as successor of J. W. Reinhart, John J. McCook, and Joseph C. Wilson as receivers of the Atlantic & Pacific Railroad Company, and as receiver of the Atlantic & Pacific Railroad Company, was and is plaintiff in error, and Truman Reeves, as treasurer of the State of California and as successor in office of W. S. Green as treasurer of the State of California, and as successor in office of the late Levi Rackliffe, was and is defendant in error, which was heard and tried in said court, and wherein a judgment was by said court rendered on the third day of May, 1898, affirming the judgment of the United States circuit court for the northern district of California, in said court rendered, manifest error has intervened in the judgment, order, and proceedings had in
90 this court, to the great damage of your petitioner; that since the rendition of said judgment Truman Reeves, treasurer of the State of California and as successor in office to the said W. S. Green, has by order of court been substituted as defendant in said cause.

Wherefore your petitioner prays for allowance of a writ of error and such other process as may cause the errors maintained in the rendition of such judgment to be corrected by the Supreme Court of the United States and cause the reversal of said judgment for such errors by the Supreme Court of the United States.

C. N. STERRY,
Attorney for Plaintiff in Error.

Order Allowing Writ of Error.

A writ of error is allowed as herein prayed for.
Dated March 6th, 1899.

WILLIAM B. GILBERT,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

(Endorsed:) Petition for writ of error and order allowing same. Service of copy of the within petition for writ of error is hereby acknowledged this 6th day of March, 1899. Tirey L. Ford and Geo. A. Sturtevant, deputy, attorneys for defendant in error. Filed Mar. 6, 1899. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

91 In the United States Circuit Court of Appeals for the Ninth Circuit.

C. W. SMITH, as Successor of J. W. Reinhart, John J. McCook, and Joseph C. Wilson as Receivers of the Atlantic & Pacific Railroad Company, and Receiver of the Atlantic & Pacific Railroad Company, Plaintiff in Error,

vs.

TRUMAN REEVES, Treasurer of the State of California, and as Successor in Office of W. S. Green as Treasurer of the State of California, and Successor in Office of the Late Levi Rackliffe, Defendant in Error.

Assignment of Errors.

Comes now C. W. Smith, successor of J. W. Reinhart, John J. McCook, and Joseph C. Wilson as receivers of the Atlantic & Pacific Railroad Company, and receiver of the Atlantic & Pacific Railroad Company, plaintiff in error in the above-entitled cause, and complains of the defendant in error, Truman Reeves, treasurer of the State of California, and successor in office of W. S. Green as treasurer of the State of California and as successor in office of the late Levi Rackliffe, now deceased, for that the said W. S. Green, as treasurer of the State of California, defendant in error in the above-entitled cause, did, on the third day of May, 1898, recover a judgment by the consideration of the United States circuit court of appeals, ninth circuit, in the above-entitled cause against the plaintiff in error, affirming the judgment of the United States circuit court for the northern district of California, theretofore rendered in said cause against the said C. W. Smith as such receiver. A copy of the record in said cause in said court, duly certified, is hereto attached and made a part hereof. That since the rendition

92 of the said judgment, and upon the 7th day of February, 1899, Truman Reeves, as treasurer of the State of California and successor in office of the said W. S. Green, was by the court duly substituted as the defendant in said cause. Plaintiff avers that there is error in said record and proceedings in this, to wit:

1st. The United States circuit court of appeals erred in determining that the circuit court of the United States for the northern district of California was without jurisdiction in said cause.

2d. The United States circuit court of appeals for the ninth circuit erred in determining that the circuit court of the United States for the northern district of California rightfully sustained the demurrer interposed in said cause by the late Levi Rackliffe, as treasurer of the State of California and predecessor in interest in said cause to W. S. Green, late treasurer of the State of California, and in the place of whom has been substituted Truman Reeves, the present treasurer of said State and defendant in error herein.

3d. The United States circuit court of appeals for the ninth circuit erred in affirming the judgment of the United States circuit court for the northern district of California, entered in the cause

wherein C. W. Smith, successor of J. W. Reinhart, John J. McCook, and Joseph C. Wilson as receivers of the Atlantic & Pacific Railroad Company, and as receiver of the Atlantic & Pacific Railroad Company, and Levi Rackliffe as treasurer of the State of California and predecessor in interest of Truman Reeves as treasurer of the State of California, the defendant in said cause, dismissing said action at the cost of said C. W. Smith as such receiver; all of which will fully appear by reference to the record attached to said petition in error.

Wherefore said C. W. Smith, as such receiver, prays that
93 a writ of error be issued, in order that the errors above stated and set forth, if any there have been, may be duly corrected and full and speedy justice done the parties aforesaid in this behalf, and that the defendant be restored to all the rights lost by the erroneous ruling of the court herein complained of.

C. N. STERRY,
Attorney for Plaintiff in Error.

(Endorsed:) Assignment of errors. Service of a copy of the within assignment of errors is hereby acknowledged this 6th day of March, 1899. Tirey L. Ford, attorney general, and Geo. A. Sturtevant, deputy, attorney for defendant in error. Filed Mar. 6, 1899. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

94 Know all men by these presents that we, C. W. Smith, as receiver of the Atlantic & Pacific Railroad Company, as principal, and W. C. Patterson and W. D. Woolwine, as sureties, are held and firmly bound unto Truman Reeves, as treasurer of the State of California and successor in office to W. S. Green as late treasurer of the State of California, in the full and just sum of $500.00, to be paid to the said Truman Reeves, as such treasurer, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of February, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at the October, 1896, term of the United States circuit court of appeals for the ninth circuit, in a suit pending in said court between C. W. Smith, as successor of J. W. Reinhart, John J. McCook, and Joseph C. Wilson as receivers of the Atlantic & Pacific Railroad Company, and receiver of the Atlantic & Pacific Railroad Company, plaintiff in error, and Truman Reeves, treasurer of the State of California and successor in office to W. S. Green as treasurer of the State of California, and successor in office of the late Levi Rackliffe, defendant in error, judgment was rendered against the said C. W. Smith as such receiver, plaintiff in error, affirming the judgment of the United States circuit court for the northern district of California, heretofore rendered in said cause, and dismissing said cause, and the said C. W. Smith, as such receiver, has obtained a writ of error to the said court to reverse the

judgment and decision of the United States circuit court of appeals, as aforesaid, and a citation directed to the said Truman
95 Reeves as such treasurer, citing and admonishing him to be and appear in the Supreme Court of the United States sixty days from and after the date of said citation:

Now, the condition of the above obligation is such that if the said C. W. Smith as such receiver, plaintiff in error, shall prosecute said writ of error to effect and answer all damages and costs if he shall fail to make good his plea, then the above obligation to be void; else to remain in full force and effect.

In witness whereof we have the day and year above written signed and sealed the foregoing instrument.

C. W. SMITH, [SEAL.]
Receiver of the Atlantic & Pacific Railroad Company.
W. C. PATTERSON. [SEAL.]
W. D. WOOLWINE. [SEAL.]

Approved by—
WM. B. GILBERT,
United States Circuit Judge and One of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

(Endorsed:) Bond on writ of error. Filed Mar. 6, 1899. F. D Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

96 United States Circuit Court of Appeals for the Ninth Circuit.

C. W. SMITH, as Successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson as Receivers of the At. & Pac. R. R. Co., and Receiver of the Atlantic & Pac. R. R. Company, Plaintiff in Error,
vs.
TRUMAN REEVES, as Treasurer of the State of California (Substituted for W. S. Green as Treasurer of the State of California *nunc pro tunc* as of January 2nd, 1899), Defendant in Error.
} No. 422.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the forgoing ninety-five (95) pages, numbered from one (1) to ninety-five (95), inclusive, to be a true copy of the record and of the assignment of errors and of all proceedings in said United States circuit court of appeals, including the opinion filed in the above-entitled case, as the same appear of record in said circuit court of appeals, and that the same constitute the return to the annexed writ of error.

Seal United States Circuit Court of Appeals, Ninth Circuit.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 9th day of March, A. D. 1899.

F. D. MONCKTON, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled March 9, '99. F. D. M.]

97 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of appeals of the United States for the ninth circuit, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between C. W. Smith, as successor of J. W. Reinhart, John J. McCook, and Joseph C. Wilson as receivers of the Atlantic & Pacific Railroad Company, and receiver of the Atlantic and Pacific Railroad Company, plaintiff in error, and W. S. Green, as treasurer of the State of California and successor in office of the late Levi Rackliffe, defendant in error, in whose place and stead Truman Reeves, as successor in office to the said W. S. Green, has since been substituted as defendant by order of said court, a manifest error hath happened, to the great damage of said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be there given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at the city of Washington, District of Columbia, within sixty days from the date hereof, that, the
98 record and proceedings aforesaid being inspected, the said court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixh day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States — Court of Appeals, Ninth Circuit.

Allowed, and the clerk of the circuit court of appeals for the ninth circuit is directed to sign and seal this writ.

WILLIAM B. GILBERT,
United States Circuit Judge for the Ninth Judicial Circuit and One of the Justices of the United States Circuit Court of Appeals, Ninth Circuit.

UNITED STATES OF AMERICA, *ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of the United States — court of appeals, ninth circuit.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk United States Circuit Court of Appeals for the Ninth Circuit.

99 [Endorsed:] No. 422, doct. Dept. —. In the U. S. circuit court of appeals, ninth circuit, State of California. C. W. Smith, receiver, plaintiff in error, *vs.* Truman Reeves, as treasurer, etc., defendant in error. Writ of error. Service is hereby acknowledged this 6th day of March, 1899. Tirey L. Ford, attorney general, and Geo. A. Sturtevant, deputy, attorney- for defendant in error. C. N. Sterry and Henry J. Stevens, rooms 543 to 546 Bradbury bldg., Los Angeles, Cal., attorneys for plaintiff in error. Filed Mar. 6, 1899. F. D. Monckton, clerk *clerk* U. S. circuit court of appeals for the ninth circuit.

100 The United States of America to Truman Reeves, as treasurer of the State of California and successor in office to W. S. Green, as late treasurer of the State of California, and who was successor in office of the late Levi Rackliffe, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, District of Columbia, sixty days from and after the day this citation bears date, pursuant to writ of error filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein C. W. Smith, as successor of J. W. Reinhart, John J. McCook, and Joseph C. Wilson as receivers of the Atlantic & Pacific Railroad Company, and as receiver of the Atlantic & Pacific Railroad Company, is plaintiff in error, and you, as such treasurer of the State of California, are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Wm. B. Gilbert, judge of the circuit court of the United States for the ninth judicial circuit and one of the judges of the United States circuit court of appeals for the ninth circuit, this 6th day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

WILLIAM B. GILBERT,
United States Circuit Judge for the Ninth Judicial Circuit.

101 [Endorsed:] No. 422, doct. Dept. —. In the United States circuit court of appeals, ninth circuit, State of California. C. W. Smith, receiver, plaintiff in error, *vs.* Truman Reeves, as treasurer, defendant in error. Citation. Filed Mar. 6, 1899. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit. C. N. Sterry and Henry J. Stevens, rooms 543 to 546 Bradbury bldg., Los Angeles, Cal., attorneys for plaintiff in error.

Personal service of the within citation upon Truman Reeves, as treasurer of the State of California, is hereby waived, and the undersigned is authorized to, and hereby does, appear herein as the attorney for said Truman Reeves as said treasurer.

TIREY L. FORD, *Attorney General, and*
GEO. A. STURTEVANT, *Deputy,*
Attorneys for Truman Reeves.

San Francisco, March 6th, 1899.

Endorsed on cover: File No., 17,337. U. S. C. C. of appeals, 9th circuit. Term No., 242. C. W. Smith, as successor of J. W. Reinhart, John J. McCook, & Joseph C. Wilson as receivers of the Atlantic & Pacific Railroad Company, & receiver of the Atlantic & Pacific Railroad Company, plaintiff in error, *vs.* Truman Reeves, as treasurer of the State of California & successor in office to W. S. Green as late treasurer of the State of California, & who was successor in office of the late Levi Rackliffe. Filed March 28th, 1899.